# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1941**

## No. 837

SMITH BETTS, PETITIONER,

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND

ON WRIT OF CERTIORARI TO THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE

**PETITION FOR CERTIORARI FILED JANUARY 3, 1942.**

**CERTIORARI GRANTED FEBRUARY 16, 1942.**

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INDEX.



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8126

[fol. 1]

# BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND

SMITH BETTS, Petitioner,

v.

PATRICK J. BRADY, Warden of the Penitentiary of Maryland, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed August 29, 1941

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland:

The petition of Smith Betts for a writ of habeas corpus respectfully represents unto your Honor:

1. That your petitioner is a citizen of the State of Maryland, and is now incarcerated and restrained of his liberty in the Maryland Penitentiary at 954 Forest Street, Baltimore, Maryland, in the custody of the respondent herein, Patrick J. Brady, Warden of said institution.

2. That your petitioner is informed and believes that the said incarceration and restraint of his liberty are solely under color of the authority of a certain sentence pronounced by Judge William H. Forsythe, Jr., Judge of the Circuit Court for Carroll County, the said sentence being for a term of eight years.

3. The facts surrounding the presentment, arraignment, conviction and sentence of your petitioner are as follows:

(a) Your petitioner was presented for robbery on May 9th, 1939. The same day indictment was filed and a true bill issued. On May 12th, 1939 your petitioner was arraigned before the said William H. Forsythe and pleaded "not guilty". At the same time your petitioner advised the Court that he was a pauper, and was without funds to [fol. 2] employ counsel, and your petitioner then requested the Court to appoint counsel to represent, aid, advise and defend him. Judge Forsythe advised your petitioner that he would not appoint counsel for him in this matter because the Court only appointed counsel for indigent defendants when they were charged with murder, manslaughter or rape.

(b) Your petitioner was unable to obtain counsel due to lack of funds, and no counsel had been appointed by the Court. Accordingly, the trial of your petitioner proceeded without his having the assistance of counsel in the defense of his case. Your petitioner maintains that he was truly innocent of the said charge of robbery. Thereupon on May 17th, 1939 your petitioner having withdrawn an application for a jury trial which he had previously filed, was tried before the Court, and on the same day there was a verdict of the Court of guilty, and on the same day there was a judgment and sentence of the Court that the defendant Smith Betts be confined in the Maryland Penitentiary for a period of eight years.

(c) At no time during the proceedings did your petitioner waive his right to counsel.

4. Your petitioner believes that his present incarceration and restraint of his liberty by the respondent in the said Maryland Penitentiary, are illegal, because based upon the above mentioned judgment of conviction and sentence which is null and void for the following reasons:

(a) That your petitioner was denied the appointment of counsel to advise him, and prepare and plead his defense.

(b) Your petitioner was obliged to stand trial without the benefit of the assistance of counsel, although he asked that counsel be appointed in his behalf, and although he at no time waived his right thereto.

[fol. 3] (c) Your petitioner was denied due process of law and therefore the said Court had no jurisdiction in the premises.

(d) Your petitioner was injured in that he has been deprived of his liberty on account of a charge of robbery of which he was not guilty either in law or in fact.

5. That your petitioner is informed and believes that the said sentence imposed is void because based upon a conviction obtained in a manner contrary to the provisions of the Constitution of the United States, and especially contrary to the protective provisions of the 14th Amendment thereof, which provides that "no State shall * * * deprive any person of * * * liberty * * * without due process of law."

Wherefore your petitioner prays that he may be released from the unlawful custody and that this Honorable Court will issue a writ of habeas corpus, directing the respondent herein to produce the body of your petitioner before this Honorable Court at a time and place to be specified therein and that said respondent be required to show cause, if any he has, why your petitioner shall not be released. And your petitioner further prays that he be permitted to commence and to prosecute to conclusion the said proceedings, without being required to prepay fees or costs, or give security therefor.

Smith Betts, Petitioner; Jesse Slingluff, Jr., Attorney for Petitioner.

STATE OF MARYLAND,
City of Baltimore, ss:

I Hereby Certify that on this 28th day of August, 1941, before me, the subscriber, a notary public of the State and city aforesaid, personally appeared Smith Betts, who made oath in due form of law that he has made the foregoing peti-
[fol. 4] tion, that he knows the contents thereof, and that the allegations therein contained are true; and he further deposes and says that he is a citizen of the United States, resident of the State of Maryland; that because of his poverty he is unable to pay the costs of said action or give security for the same, and he believes he is entitled to the redress he seeks therein.

As Witness my hand and notarial seal.

Bernard J. Schulte, Notary Public.

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[fol. 5] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND

[Title omitted]

ORDER TO SHOW CAUSE—August 29, 1941

Upon the foregoing petition and affidavit it is this 29th day of August 1941 by the Court of Appeals of Maryland Ordered that Patrick J. Brady, Warden of the Maryland Penitentiary be and he is required to show cause, if any he has, on or before the 15th day of September 1941, why the writ of habeas corpus requiring him to produce the body

of Smith Betts before me, should not issue, provided a copy of this order be served upon him on or before the 30th day of August, 1941;

Carroll J. Bond, Judge.

[fol. 6] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND

[Title omitted]

ANSWER OF RESPONDENT—Filed September 15, 1941

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland:

The answer of Patrick J. Brady, Warden of the Maryland Penitentiary, to the petition heretofore filed in the above entitled case, respectfully represents:

1. Answering paragraph 1 of said petition, your respondent admits that the petitioner is incarcerated in the Maryland Penitentiary, in the custody of your respondent, but avers that he has no knowledge as to whether or not the petitioner is a citizen of the State of Maryland.

2. Your respondent admits the allegations of paragraph 2.

3. (a) Your respondent admits the allegations of paragraph 3 (a).

(b) Answering paragraph 3 (b), your respondent neither admits nor denies that the petitioner was unable to obtain counsel due to lack of funds, but demands strict proof thereof. Your respondent admits that no counsel was appointed by the Court, and your respondent further admits that the trial of the petitioner proceeded without his having counsel. Your respondent is advised and therefore denies that the petitioner was "truly innocent of said charge of robbery," as is alleged in the petition. Your respondent admits the other averments of paragraph 3(b).

(c) Your respondent neither admits nor denies the averments of paragraph 3 (c), but demands strict proof thereof.

[fol. 7] (d) Further answering paragraph 3, your respondent is advised and therefore avers that petitioner was informed of his right to summon witnesses to testify in his behalf, and that he availed himself of this right by summoning and calling numerous witnesses; that the trial of the petitioner was even suspended for a time so as to afford him an opportunity, through the sheriff, to bring into Court additional witnesses; that the petitioner was granted, and took full opportunity of, his right to cross-examine the witnesses against him.

Your respondent is advised and therefore avers that the guilt of the petitioner was abundantly proven beyond the slightest question of doubt; and that he was familiar with Criminal Court practice as is exhibited by his previous criminal record.

Further answering said paragraph 3, your respondent avers that the practice and procedure followed in the petitioner's case, with reference to the appointment of counsel, in nowise differed from the invariable practice followed for years in Carroll County; the petitioner's cause was treated in exactly the same manner as every other criminal case tried in the said County, and petitioner was afforded a full, fair, and complete trial on the merits of the charge against him.

4. Answering the various averments of paragraphs 4 and 5, your respondent alleges that the statements therein contained are simply conclusions of law by petitioner, and thus do not require any answer.

5. Further answering said petition, your respondent avers that the petitioner, on June 5, 1941, filed a petition for a writ of habeas corpus before the Honorable Joseph D. Mish, Associate Judge of the Fourth Judicial Circuit in Washington County, at which time substantially the same point was raised by petitioner; and that, after a hearing, the petitioner was remanded to the custody of your respondent by the said Honorable Joseph D. Mish.

[fol. 8] 6. Finally, your respondent avers that the petitioner was fully accorded all the rights and privileges guaranteed to him under both the Constitution of the United States and the Declaration of Rights and Constitution of Maryland.

Having fully answered said petition, your respondent prays that the petition for a writ of habeas corpus be dismissed.

And, As In Duty Bound, Etc.

Patrick J. Brady, Warden, The Maryland Penitentiary.

Morton E. Rome, Assistant State's Attorney for Baltimore City, Attorney for Respondent.

*Duly sworn to by Patrick J. Brady. Jurat omitted in printing.*

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[fol. 9] Before the Honorable Carroll T. Bond, a Judge of the State of Maryland

Docket Entries

August 29, 1941. Petition for Writ of Habeas Corpus.

September 15, 1941. Answer of Respondent, filed.

September 26, 1941. Stipulation filed.

September 26, 1941. Hearing had and testimony taken, Exhibits filed.

October 6, 1941. Opinion of Judge; filed and order remanding prisoner filed.

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[fol. 10] Before the Honorable Carroll T. Bond, a Judge of the State of Maryland

[Title omitted]

Stipulation of Facts—Filed September 26, 1941

It is agreed by and between counsel for the petitioner and counsel for the respondent that the following are the true facts in the above entitled matter:

1. The petitioner was arraigned in the Circuit Court for Carroll County, before the Honorable William H. Forsythe, Jr., an Associate Judge of the Fifth Judicial Circuit for

thirty-four years, and now Chief Judge of said Circuit and an Associate Judge of the Court of Appeals of Maryland, and at the time of his arraignment he advised the said Judge that he could not afford counsel to represent him and he requested that counsel be appointed for him; that the said Judge advised Smith Betts that it was the practice in Carroll County to appoint counsel for indigent defendants only in cases of Murder and Rape, and he refused to appoint counsel for Betts, and that Betts pleaded not guilty to the charge.

2. That the case of State of Maryland versus Smith Betts was duly called to trial five days after the said arraignment, and at said trial the case was adjourned while additional witnesses were summoned for Betts; that at said trial the several witnesses appeared and testified; that Betts was allowed to testify in his own behalf and was given full opportunity to be heard in his own defense, to examine his witnesses, and to cross-examine the witnesses [fol. 11] against him; that the certified copy of the docket entries is true and is filed herewith.

3. That it has been the practice in Carroll County since time immemorial, and to the personal knowledge of Judge Forsythe for the thirty-four years he has been on the bench to appoint counsel for indigent defendants only in cases of Murder and Rape, that is, cases involving the possibility of capital punishment.

4. That Smith Betts testified before his Honor, Judge Bond, that he, himself, could not afford counsel at the time of his trial, nor could he obtain counsel to represent him.

5. That Smith Betts testified under cross-examination that he had friends in Carroll County, having been born there; that his father had been a Minister in Carroll County; that his sister lived there, but that she refused to obtain counsel for him; that he could read and write English; that he was forty-three years of age; that in 1935 he had been convicted of Larceny and had been sentenced to serve three years in the Maryland House of Correction, on a plea of guilty.

Jesse Slingluff, Jr., Counsel for Petitioner. Morton E. Rome, Assistant State's Attorney for the City of Baltimore, Counsel for Respondent.

[fol. 12] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND

## Record from Circuit Court for Carroll County in Case of State of Maryland v. Betts

CERTIFIED COPY OF DOCKET ENTRIES, JUDGMENT AND SENTENCE

No. 1052 Criminals to May Term, 1939

1939 May 9. Presentment for Robbery fd. & B. W. issued. Same day indictment fd. True Bill

STATE OF MARYLAND

vs.

SMITH BETTS

1939 May 12. B. W. returned "Cepi in jail" & filed. 1939 May 12. Traverser arraigned. Plea of Not Guilty. Elected to be tried by Jury. 1939 May 17. Election of Jury trial withdrawn & submitted and tried before the Court. Same day verdict of the Court of Guilty. Same day Judgment and Sentence of the Court, that the Traverser, Smith Betts, be confined in the Maryland Penitentiary for a period of Eight years. Same day copy of Docket Entries, Judgment and Sentence of the Court delivered to the Sheriff of Carroll County to be left with the Warden of the Maryland Penitentiary.

STATE OF MARYLAND,
Carroll County, to wit:

I hereby certify, That the above is a full and true copy of the Docket Entries, Judgment and Sentence of the Court in No. 1052 Criminals, State of Maryland vs. Smith Betts, as taken from the Criminal Records of Carroll County, Criminal Docket Liber E. M. M. Jr. No. 11, folio 129.

In Testimony Whereof, I hereto set my hand and affix the Seal of the Circuit Court for Carroll County, this 25th day of August, A. D. 1941.

(Signed) Levi D. Maus, Clerk of the Circuit Court for Carroll County.

[fol. 13] In Circuit Court of Carroll County

Indictment

State of Maryland,
Carroll County, to-wit:

The Grand Jurors of the State of Maryland, for the body of Carroll County, do on their oaths and affirmations present that Smith Betts late of said County, on the 24th day of December, in the year of our Lord one thousand, nine hundred and thirty-eight, at Carroll County aforesaid, upon Norman Bollinger feloniously did make and assault and said Norman Bollinger in bodily fear then and there feloniously did put and Fifty-Dollars, current money, of the value of Fifty Dollars, the property of J. David Baile, trading as the Medford Grocery Company, which said current money was then and there in the possession of the said Norman Bollinger who was then and there the servant and agent of the said J. David Baile, from the person and against the will of said Norman Bollinger, then and there feloniously and violently did steal, take and carry away.

Contrary to the form of the Statute in such case made and provided and against the peace, government and dignity of the State.

[fol. 14] Second Count

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Smith Betts, on the said day, in the said year, at the County aforesaid, feloniously did steal, take and carry away Fifty Dollars, current money, of the value of Fifty Dollars, of the monies and property of J. David Baile, trading as the Medford Grocery Company.

Contrary to the form of the Statute in such case made and provided and against the peace, government and dignity of the State.

(Signed) Geo. N. Fringer, The State's Attorney for Carroll County.

True Copy Test:

Levi D. Maus, Clerk.

[fol. 15] IN CIRCUIT COURT OF CARROLL COUNTY

**Statement of Evidence**

The records of the Circuit Court for Carroll County show that the following witnesses were subpoenaed on behalf of Smith Betts:

Mary Emerson
George Eula
Mrs. Libby Eula
Catherine Stephens
Mrs. Fletcher
Willie Fletcher
Virginia Fletcher
Buck Pryor
Lige Painter
Charlie Renner

They also show that the following witnesses for whom subpoenas were issued, were not summoned:

Robert Evans
Kenneth Emerson
Robert Swartz

It also appears from the records of the Circuit Court for Carroll County that the summons for Robert Evans arrived at the Sheriff's Office at 11:30 a. m. on the day of the trial and therefore could not be served in time.

The following testimony was heard in the case of State of Maryland v. Smith Betts, in the Circuit Court for Carroll County, before the Honorable William Henry Forsythe, Jr., without a jury, at the Court House, Westminster, Carroll County, Maryland, on May 17th, 1939.

Counsel present for the State: George N. Fringer, Esq., State's Attorney.

No appearance for the defendant.

Norman Bollinger, a witness produced on behalf of the State of Maryland, after having been duly sworn according to law testified as follows:

By Mr. Fringer: On December 24th, 1938, I was working at the Branch store of Medford Grocery Company in Carroll County. On that evening, as I was closing the store and com-[fol. 16] ing out, at about five minutes after five, I walked to my car to get in. A car pulled up and slowed down; and I thought it was another customer, and as I was going *to*

back to wait on them, I threw the envelope containing what I had taken in that day on the front seat of my car, and held the change bag in my hand. The other car pulled up, slowed down and stopped, and a man walked around it, drew a gun out of his right overcoat pocket, and asked me for my money. First he asked what I had in the bag. I don't know just whether I said nothing or just how I said that but he asked me to hand it over and I said nothing doing, and he said, "You are not telling me that," and I don't know whether it was the safety or the hammer or what I heard click. He had his hand over the back part of it and I said, "Well, I guess it is the best I could do," and I handed the money over and he turned around to his 1930 Chevrolet Coach, with a green body and red wheels, and I thought of looking at his license number but it was covered or awful muddy and I couldn't make out the number. I went right over to the phone and phoned both ways to watch the road to see if they could see that car.

It was fairly dark but I could see that the man had on a dark overcoat and a handkerchief around his chin and a pair of dark amber glasses. The handkerchief was not over his chin. He also had on a hat. I am employed by Medford Grocery Company, and he got the change bag, which had exactly fifty dollars in it. There was another fellow in his car with him but I couldn't identify him because his car was opposite mine and I didn't see him, and he stayed in the car and kept it ready to get away, and he didn't get out of the car.

After they left I called the authorities both in New Windsor and Westminster, to get help as quickly as I could. Subsequently I was called to jail, where the State police asked me if I could identify this man. I told them that I wasn't sure I could identify him without the glasses and the handkerchief, after seeing him when it was almost dark that evening. Smith Betts put on the glasses and then I could identify him.

[fol. 17] : Court: Q. Did you identify him?

A. Yes, sir.

Q. Are you positive that is the man?

A. Yes, sir.

Mr. Fringer: Q. Before you saw Smith Betts over at the jail, did you hear anything? Did you hear him speak or anything like that?

A. Yes, sir, as we stood out in the hall they had him in there and asked him questions to see if I could identify his voice. I told them before he had an awful determined voice, rough sort of voice, and I could identify that as I stood in the hall as the voice that was there that evening.

Q. Who were there with Betts over at the jail, which officers were there?

A. Sheriff Shipley and Officer Mason and Chief Deputy Mathias was there.

Q. He was with them when you came in and saw him?

A. Yes, sir.

Court: Q. You had never seen this man before?

A. Not before, until then.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

Defendant: Q. Mr. Bollinger, the night of the 24th you said that I was supposed to be dressed in a dark overcoat?

A. Yes, sir, dark. Of course, they had gray on you down here, but it was dark.

Q. Then you identified the gray overcoat to be the dark one?

A. I identified that to be the coat.

Court: Q. You mean the coat he had down here?

A. Yes, sir, because it was bagged at the pockets and everything the same as it was when he was over there that night?

Q. Was it dark gray or a light gray coat?

[fol. 18] A. Dark gray.

Defendant: Q. Was you close enough to tell whether my pockets was worn?

A. I couldn't tell whether they were worn but they were bagged. All I could say that they were bagged at the bottom. I couldn't tell you whether they were worn or not.

Q. Bagged at the bottom?

A. Yes, sir.

Q. Did you say he took the money or did you hand it to him?

A. I had to hand it to him.

Court: Q. Did he have the gun pointed at you?
A. Yes, sir.
Q. Did you see the gun?
A. Yes, sir.
Q. What kind of gun was it?
A. Well, I can't say. It looked like a 22 caliber to me.
Q. Could you tell whether a pistol or what?
A. It looked like a pistol to me—a revolver that has a cylinder in that goes around. That is what it looked like but he had his hand over the back part.
Q. He pointed that directly at you?
A. Yes, sir, right at my stomach. He held it right down at his side.

Examination concluded.

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FRANK MILLER, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. Fringer: I live at Medford, and on December 24th, 1938, I was at the Medford Grocery Company's store at the oil and gas department between four and five o'clock. [fol. 19] I saw Smith Betts there. As I was going to the storeroom he walked up and said, "Where is the oil man?" in a rough manner. I said, "He is right in here." He came in, him and this other fellow followed him. I couldn't identify the other fellow at all because I didn't notice him in particular. He said, "I want a half gallon of oil without any top on it." By that I didn't know what he meant, of course. I didn't pay much attention to it and I was standing there waiting to pay my bill for stuff and gas out of the dollar bill in my hands and he spoke up and said he didn't believe dollars was very hard to get around there; there seemed to be plenty there. Of course, I began to think something was wrong and then I put my hand back on my pocket book and that is about all I could tell.
Q. Did you see him any more?
A. No. I went on up to the main store after some oysters.
Q. Where was he as you left?
A. Still at the Oil Department.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

Q. Mr. Miller, would you tell just how I was dressed?

A. No, I can't just tell, but you were so close to me I could identify you. You were right against me, pretty near. I looked at your face.

Court: Q. What time of the day was that?

A. Between four and five o'clock. I just can't tell exactly now. It was at the Filling Station, there at the Oil and Gas Department.

Q. Is that close to the store where this other man was working?

A. The man held up?

Q. Yes.

[fol. 20] A. No, sir, not so close.

Q. How far from it?

A. I can't tell you how far. About—well, it is not a quarter mile.

Examination concluded.

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Harry W. Poole, a witness, produced on behalf of the State of Maryland, after having been duly sworn and examined according to law, testified as follows:

Direct examination.

By Mr. Fringer:

I work for the Medford Grocery Company, and about closing time on December 24th, 1938, I saw Mr. Betts in the main building of the grocery department where I worked. He was with another fellow and they bought a few things. I am sure that it was Smith Betts, because I have known him before. His father used to live and farm not very far from where I lived. I hadn't seen him for four or five years, but I have no doubt that it was he.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

I could identify the clothes you had on and I knowed your voice as soon as I heard it. That was the first thing that drawed my attention to you, your voice. It may be possible that I haven't seen you since 1923; I couldn't tell you just how long its been; its been a long time, I know that.

Examination concluded.

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Lixwood Duty, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. Fringer:

On December 24th, 1938, at about four thirty to five o'clock, [fol. 21] I worked in the Oil and Gas Department of the Medford Grocery Company, about twenty-five yards from the main store, and saw the man Smith Betts on that day.

Q. Just explain under what circumstances you saw him? A. Well, he came in and I was very busy at that time. He came in my department I run and he came in in kind of a rough voice and had a whole lot to say. I mean, I noticed the man. I was busy at the time but I noticed him by the way he came in. I heard him say, "Where is the oil man" and this Mr. Miller spoke up and said, "Right here." And then he said it in a rough voice and I looked up at the man. I was down behind the counter waiting on Mr. Miller at the time and this Mr. Miller and him kind of got in a conversation about money. He talked as if it was plentiful and easy to get and then this Mr. Miller and him kind of got in a conversation about this dollar he was going to pay me for what he got. When I was finished waiting on Mr. Miller I walked around and asked Betts what he wanted. He said, "I want a half gallon of oil with the top off." That is the very words he said. I drawed this oil and taken it out and put it in his car. His

car sat up, I would say 20 yards from my department, up on a little grade like.

Court:

Q. What kind of car was it?

A. I never noticed. I was busy at the time and I never noticed in particular about the car, but I know around a '30 or '31 Chevrolet. Both them models are so near alike they are a little hard to tell apart.

Q. Did you notice the color of the car?

A. If I remember right I think it was green, with some color wheels, but I just never noticed exactly. I know it was pretty dirty and muddy. It had a good bit of mud on it. [fol. 22] Q. Did this man appear to be drinking?

A. Well, his appearance and the way he came in there seemed like the way he talked, I would judge he was drinking. Of course, I didn't smell anything on him. I didn't get that close to him. He didn't pay me for a while. The man with him paid me for the oil, 25¢ for a half gallon. He came down to the counter and paid me and Betts stood up on kind of an offset on the concrete wall and he was talking over different things all the time. As for the conversation, that is what he said, but he said enough I noticed him pretty close. That was the words he said about the oil—"I want a half gallon oil with the top off". That was a strange thing for a man who wanted oil to say anything like that. He was dressed in an overcoat but I can't tell you exactly the color of it. This man with him he was not quite as tall as he was and a little heavier built.

Mr. Fringer:

Q. Are you sure he is the one?

A. He is the one with this other fellow. I never noticed when they left which one was driving. I went back in my department and went to work.

Q. Did you notice which way they went?

A. They went out the other way but I never noticed who was driving. They went out towards the branch store, out that way. That was between—I imagine around a quarter-of-five, four thirty or quarter of five. I know it was getting close to closing time. We close at five o'clock.

Examination concluded.

B. C. Mason, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. Fringer:

Q. You are Officer B. C. Mason of the Maryland State Police?

[fol. 23] A. Yes sir.

Q. Do you know anything about this case of robbery that happened on December 24, 1938?

A. This robbery was reported on the 24th. During the course of this examination I learned that Betts was in the vicinity of New Windsor on a Thursday, on the 22nd, he and another fellow by the name of Dunn. I also learned from one of the witnesses that Betts was in the store, although I didn't see him there.

Mr. Fringer:

Q. Tell what happened when you first saw him?

A. Well, we went to Hagerstown and picked him up and brought him back to jail here and the witness, the boy that was held up and Mr. Poole in the store, they were both over there and before they had seen him they were put out in another room and we brought him out of the jail and we talked to Betts and the boy that was held up, as we came in there, he identified him first by the voice, as the voice that told him to put his hands up. Then we put this dark gray overcoat on him and the pair of smoked glasses and then brought the boy out that was held up and Mr. Poole, and they identified him. The boy identified him as being the man that held him up there at the store that day. That is about all I could tell you.

Q. Did Betts say anything or make any statement when you arrested him or over at the jail in the presence of these men?

A. He had denied throughout of being involved in this holdup.

Q. He never admitted it?

A. No, sir. He admits being down here on Thursday, down to Baltimore, with this man Dunn, and going back to

Hagerstown the following morning, but not as to having anything to do with this holdup.

Direct examination concluded.

Defendant: No question. He told a straight story.

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WALTER L. SHIPLEY, a witness, produced on behalf of the State of Maryland, after having been duly sworn ac- [fol. 24] cording to law, testified as follows:

Direct examination.

By Mr. Fringer:

I am the sheriff of Carroll County, and I was with the officer when Betts was arrested. I also was at the jail when Mr. Poole and the others identified Betts. At that time I put the boy Bollinger out in the hall, and talked with Betts before they saw him, and Bollinger shook his head like as if he recognized the voice. And then Mr. Frank Miller came down several days later and identified him. They said they could identify the man at the store. I think there were eight or ten in the jail, and I said, you boys go back and see if you can pick him out of the bunch. Of course, immediately when they walked back, they picked him out.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

I cannot remember the conversation which I had with Mr. Poole the day he was in the jail and identified you.

Court: He wants you to tell what Mr. Poole said.

A. I just cannot remember the exact words.
*D.* Could you recognize it if you heard the words spoken?
A. I couldn't say for sure.

Court: You can ask him what he said.

Defendant:

Q. Do you remember, Mr. Poole, looking at me a minute and saying: "Yes, I think that is the man," and then a

second remark was made and he said, "Yes, I believe that is the man."

A. Now, he might have said that. I wouldn't contradict that because I don't just remember.

Examination concluded.

---

J. Wesley Mathias, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

[fol. 25] By Mr. Fringer: I am Chief Deputy Sheriff of Carroll County and I was in the jail the day Messrs. Poole and Bollinger were brought in to identify Smith Betts. Smoked glasses were put on Betts' eyes and a handkerchief around his neck like the man was supposed to have had that did the holding up, and Bollinger and Poole identified him as the man that held them up. Betts was talking inside and Bollinger recognized his voice in the hall before he saw Betts.

Direct examination concluded.

No cross-examination.

Mr. Fringer: That is all, your Honor.

Court: Now Betts, you can call your witnesses.

---

Testimony Produced On Behalf of the Defendant

Mary Emerson, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination:

By Smith Betts, Defendant: On the 24th of December 1938 Mr. Betts was home all day Saturday, that is he was in Hagerstown. I saw him around four or four-thirty and later between six and seven o'clock.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: Are you sure it was the day before Christmas?

A. Yes sir.

He was home on the day before Christmas and was home all day up until along about four or four-thirty. He goes down the street and gets the groceries and then comes back. About five o'clock Mrs. Fletcher come over and asked him to do a favor for her and I went instead of him. Then about five-thirty when we came downstairs to go out the wife of the people we rent from was gone out, and then we went down the street and he got a shave and hair cut and then come on down after me to come home and we was back home anywhere from nine to ten o'clock.

The witness then continued as follows: Smith Betts has no occupation. He was applying for work on W. P. A. He and I live together, but we are not married.

Examination concluded.

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[fol. 26] George Uhler, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination.

By Smith Betts, Defendant:

Q. Mr. Uhler, just tell the Court just what taken place on Friday and Saturday, December 24th?

A. Well, Friday you were down the street a good bit but on Saturday you were around the house pretty near all day because you were complaining about having a headache and not feeling so good. At this time that was supposed to have been the robbery he had went to Mr. Renner's store for some potatoes and lard, and that was around four-thirty in the evening and then he came back just about five o'clock. He was gone about a half hour. He was around the house up until about eight o'clock and then him and the woman he lives with went down the street and then they came back about quarter-of-ten.

Q. Just tell them what happened and what took place on Friday after dinner? Just what I done Friday after dinner?

A. He rents the room from me up there and he got a check from the Welfare for $10 and he owed me some rent and after dinner I went with him down the street and he got the check cashed and he gave me $5 towards the rent and then me and him was together down the street all afternoon on Friday and we came back about four o'clock in the evening.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: I rent a room in my house to Smith Betts. I work on W. P. A. We do not work on Saturday. I have seen Dunn, who owns an automobile, but I had not seen him for more than a week prior to Christmas. I had known Smith Betts for about a year, and he had been living with me since last September. We do not work together on W. P. A. He worked for farmers, cutting corn and such things, off and on.

[fol. 27] I worked on Friday and my wife told me that Betts was there on that day, but I myself saw Betts in Hagerstown on Saturday.

Court:

Q. When did you go on Friday to have this check cashed?

A. Sir?

Q. You said you went with him on Friday to have the check cashed. What time?

A. Are you sure that was Friday or Saturday?

Defendant: It was Friday, George.

Court: When was it?

A. I couldn't say. It was one of the days. It couldn't have been Friday because I was working.

Q. You said on direct examination it was Friday and then you were with him after that all the time. Now what is right?

A. Well, I couldn't say what day it was because he paid me the money, but I don't know what day it was. He got the check from the Welfare and he gave me half of it for rent.

Examination concluded.

LIBBY UHLER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination:

By Smith Betts, Defendant: I saw Smith Betts in and around the house all day the Saturday before Christmas of 1938, that is up until I left the house, about five thirty in the afternoon.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: I know that it was about five thirty on the Saturday before Christmas because I left the house to buy the children some toys. I had not done my Christmas shopping earlier because I had no money, and on that day Smitty gave me $5 out of his Welfare check, to go downtown [fol. 28] on Saturday evening to get the children's toys with. That is he gave it to my husband sometime Friday afternoon, after my husband came from work, because my husband gave it to me when I came from work in the evening.

I had seen the Welfare check before Smith Betts saw it. It was a Washington County Welfare check. The check came through the mail and I gave it to Smith Betts' wife, (that is the woman he was living with). I have known Smith Betts for about a year and half and I met him at Billy's Tavern. He came to live in our house shortly after school started in September 1938. I have seen Smith Betts in his brother's automobile, but I never saw him in an automobile owned by Dunn. I do not know whether he has dark glasses, but he owned a real light gray overcoat which was not in bad condition.

I did not see him with any money after Christmas but he gave my husband half of his welfare check before Christmas.

My husband rented the room to him with my permission although he knew that he and the woman he was living with were not married. They have lived together for about three years.

Examination concluded.

WILLIAM FLETCHER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination.

By Smith Betts, Defendant:

Q. Mr. Fletcher, just tell them what you know about Saturday or anything you know about it?

A. Well I know Mr. Betts was home on Saturday, the day before Christmas, because I wasn't working that day and I live next to him. I know he was there until four o'clock because I went down the street and then I didn't see anything of Mr. Betts until Christmas morning.

[fol. 29] Court: Q. You saw him at four o'clock?

A. Four O'clock Saturday evening, yes, sir. When I left home. I went down town. It was late in the night when I came back and I didn't see Mr. Betts because I guess he was over in his room. Mr. Betts was there early on Christmas morning because I called him and got a cigarette from him. I offered him a drink of beer out of a beer bottle and he said he didn't want any. That is about all I know about it.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: I am sure that it was around four o'clock because I looked at the clock. I know Dunn that Betts goes around with and he owns a 1928 Chevrolet with blue body and black fenders. I work on W. P. A. but I wasn't working on Saturday before Christmas. I live with my mother and I have several brothers and sisters. I am sure that I saw Betts the Saturday before Christmas, because my brother was there at the time, and he came up the Saturday before Christmas. I saw him also on Christmas Day, asked him if he wanted a drink of beer, and he said "No." I do not own a car. Ells Dunn lives up on Honey Hill, and I have known him for three or four years. I am not related to Smith Betts.

Examination concluded.

MRS. WILLIAM FLETCHER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law testified as follows:

Direct examination

By Smith Betts, Defendant:

Q. Mrs. Fletcher, just tell the Court just what you know about me and where I was at the 24th?

A. Well, I know you was home the whole day, or was backwards and forwards to your room, except when you went out to the store and got some potatoes and some lard [fol. 30] and some bread and then come in and then I come over and asked you to do me that little favor at five o'clock—and I looked right up at the clock. I thought they were all gone down town and I would do this little trick while they were gone and I come and asked you to do it for me and you said your head hurt and that you felt bad, and you had told me that several times during that day, that your head hurt you, and you said, "Let Mary go," and she was peeling potatoes and then I got her to go and she come back while I went to my room. Then around about eight o'clock, or between seven and eight, you came down stairs and went out, and then around ten o'clock you came back. That is all I know about it.

Court: What day was this?

A. On Saturday, the 24th of December.

The witness then continued as follows:

My son rented a room from Mr. Uhler and we moved in there about the first of December of 1938, and I saw Smith Betts in and around the place all day long. He had no work at that time. I wanted Betts on the Saturday before Christmas to go down and get me a bottle of beer. The rest of them kicked about me drinking a bottle of beer and I asked him to go. I went downtown the Friday before Christmas, but I did not go out on Saturday evening. I did not see him with any money on Christmas day. He did not get me the bottle of beer, but Mary Emerson did, and that was the only beer I had on that day. I didn't want the others to know that I was drinking beer, and that's the reason I asked Betts to get the beer for me before my son

came back from downtown, and I looked at the clock at that time.

Examination concluded.

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CHARLES RENNER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination.

By Smith Betts, Defendant:

[fols. 31-32] To the best of my knowledge, Smith Betts came in my place at a quarter of twelve Saturday night December 24, 1938 and stayed there until about quarter of one. I don't remember seeing him earlier in the afternoon. I couldn't tell whether he spent much money, because I just picked up what was lying on the table where they paid for the goods as they got them, and I don't know who put it down.

Examination concluded.

Smith Betts, Defendant: That is all.
Court: Do you want to take the stand?
Smith Betts: No, sir. I have no more to say.

(Case concluded.)

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At the conclusion of the case, Smith Betts was sent to the Maryland House of Correction for a term of eight years.

On June 5, 1941, Smith Betts, on his own behalf filed a petition for writ of habeas corpus before the Honorable Joseph D. Mish, Judge of the Washington County Circuit Court, at Hagerstown. The writ was issued on June 5, 1941, and the hearing was had on June 17th, 1941.

On June 17th, 1941 Smith Betts was returned to the custody of the Maryland Penitentiary.

The present petition for writ of habeas corpus was heard on September 26, 1941 and on October 6, 1941 the Honorable Carroll T. Bond, Judge, filed the following opinion:

[fol. 33] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND

OPINION—October 6, 1941

Betts, a prisoner in the Maryland Penitentiary prays the writ of habeas corpus to compel his release because on his trial, on May 17, 1939, the court refused to appoint counsel for him at his request. He was held for trial on a charge of robbing a grocery store attendant in Carroll County at the point of a pistol, on December 24, 1938, pleaded not guilty, and after having first prayed a jury trial withdrew that prayer and prayed trial by the court, and upon testimony taken was convicted. He had before the trial stated that he was unable to employ counsel for himself, and on that ground requested that the court do so, but the court declined, as it regularly provided counsel only in cases possibly capital. There is no statute governing the furnishing of counsel, and the courts of the various state jurisdictions differ somewhat in practice.

On June 17, 1941, he obtained a first writ of habeas corpus from the Hon. Joseph D. Mish, in the Circuit Court for Washington County, summoned twelve witnesses and argued his case, including the same point now raised, although he appears then to have pressed chiefly an objection that some witnesses desired for the defense on his trial had not been summoned by the sheriff, an objection on which the court found against him on the facts. He had no counsel for that first application for the writ, or for the hearing.

[fol. 34] The effect of the Act of 1941, chapter 484, on an application for a second writ has been argued. Counsel now furnished to the applicant prepared and had signed merely an order directing the warden of the penitentiary to show cause why the writ should not issue, a practice so far unknown in Maryland, but one that seems to me proper since the passage of the act. It has long been the requirement that a judge to whom application is made should "forthwith grant the writ of habeas corpus". Code, Art. 42, sec. 3. But the recent statute provides that this shall not be done if it appears from the complaint and docu-

ments attached that the petitioner is not entitled. And it has repealed the previous section 14 of the Code article which gave a right of action against any judge who might refuse to issue the writ. In the federal jurisdiction the similar qualification, that the writ is to be denied when it appears from the petition that the applicant is not entitled, has been held to justify the use of an order to show cause. Walker v. Johnston, 312 U. S. 275, 284; R. S. 755, U. S. C. 455. And there seems to be another reason for its use in the fact that the Maryland Act of 1941 has been, notoriously, passed to put a check to the career of a prisoner who, under the former practice of granting the writ repeatedly, without limit to the number of times, (Bell v. State, 4 Gill, 301, 304), had in recent years applied for sixty or seventy in [fol. 35] succession, with the object, possibly, of relieving the monotony of his confinement by journeys to and from judges about the State.

There is now no specific statutory denial of a right to repeated writs, and no specific allowance of it. The statute, (section 3), refers only to a single instance of complaint and application. It seems to me, however, that the amendments made could not fairly be said to show a legislative purpose to depart so far from the former practice as to deny all power to issue a second writ. At the same time I cannot believe the Legislature could fairly be considered to have intended leaving the frequent applicant mentioned at liberty to continue obtaining writs indefinitely merely by omitting from his applications any showing that he is not entitled. My conclusion is that a judge would be acting in accordance with the purpose of the statute if he should accept the decision on a first writ as a sufficient adjudication on the complaint and refuse to issue a further one, or, having issued it, should remand the applicant—unless some extraordinary cause is shown against that action. This would require the exercise of some judgment on the second application, and because of that fact an order that cause be shown seems appropriate.

The objection here is that there was a denial of constitutional due process of law in the lack of counsel appointed by the court. The defect, if it was one, still ex- [fol. 36] isted at the time of the hearing on the first writ. And in this there seems to me to be a reason for hearing the second application, now that the point is taken up with the assistance of counsel. I think I am required to

consider the ground as all one, continuing through the hearing on the first writ, and now newly presented. Judge Mish agrees with me that I should do so.

Under the decisions of the Court of Appeals of the state, it is not a proper ground for action on a writ of habeas corpus; an appeal would be the proper method, and there has been no appeal. Bell v. State, 4 Gill, 301; State v. Glenn, 54 Md. 572, 607; Lancaster v. State, 90 Md. 211, 215. Possibly the petitioner could not have prosecuted an appeal in time. The Supreme Court of the United States has in some decisions in recent years given an extended function to the writ on a theory that although jurisdiction generally of cases of the kind existed below at the outset, it was lost in particular cases by departures from due process of law, and judgments rendered become nullities, to be disregarded on hearings upon the writs. Powell v. Alabama, 287 U. S. 45; Johnson v. Zerbst, 304 U. S. 458; Avery v. Alabama, 308 U. S. 444; Walker v. Johnston, 312 U. S. 275; Smith v. O'Grady, 312 U. S. 329. But there has been suggested here a question whether a Maryland state judge is authorized to make a like extension of function for the state writ in the face of the cases which have limited it. If this is done the writ might sometimes be used to supplant the regular method of appeal, with its advantage [fol. 37] that an error may be corrected by a new trial rather than by a complete discharge of the accused. Resort to the federal writ was suggested as the proper method. But the point may be passed in this case for I do not see a lack of due process of law on the theory of the Federal jurisdiction. See Smith v. O'Grady, 312 U. S. 329.

The case is initiated by an organization interested in such questions, to test a contention that, according to the decisions of the United States Supreme Court already cited, when any person convicted of a criminal charge has been unable to employ counsel for himself, and the trial court when requested has refused to employ counsel for him, there has been in his conviction a lack of constitutional due process of law which renders any imprisonment unlawful, and requires his discharge. In the statement of the contention no distinction is allowed between criminal charges of different magnitudes, or in respect to courts. Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require

the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it. And there is express acceptance of the consequence that as the Fourteenth Amendment to the United States Constitution commands the protection of due process of law for property as well as for life and liberty, counsel would also need to be furnished in civil cases involving property, as in condemna-
[fol. 38] tion proceedings, perhaps in replevin suits. It is thought to have been decided in effect that in none of those cases can there be a trial with due process of law unless there is counsel for the defendant.

It seems to me the decisions cited are not to be so construed. There is no need of inserting a study of them here; the court on appeal would not be helped by it. But my conclusion is that in the cases in which discharges were found necessary because of a lack of the due process, there was either a peculiar helplessness and need in the defendants, or, because of other facts and conditions, an intolerable degree of unfairness. It has in each case been largely a matter of degree. And in measuring this the Supreme Court has rehearsed and analyzed the circumstances of each case for itself. "The decision (in Powell v. Alabama, 287 U. S. 45), turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing". Palko v. Connecticut, 302 U. S. 319, 327. "The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist." Boyd v. O'Grady, 121 Fed. (2d.) 146, 147.

That every presiding judge will care for the interests of a defendant in every case if he is without counsel is, as argued, doubtless illusory. The argument that he can never do so is perhaps logical, but not always true, I think. I have been struck by the care exercised even by prosecut-
[fol. 39] ing attorneys for the interests of prisoners who have had no counsel, at least so far as eliciting the truth in their favor has been concerned. Trials without counsel are less contentious, and especially when trial without jury is elected, as is usual in Maryland, are more informal. Certainly my own experience in criminal trials over which I have presided, (over 2,000, as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners. And I think the Supreme

Court on a complaint of lack of due process has meant to discriminate.

The issue tried in the present case was one of identity of the robber. There was no dispute of the robbery. The testimony of four men who were at the time at work about the store seems to leave no room for doubt of that. And these four witnesses testified to the defendant's identity as the robber, two of them from the appearance of the man alone, and two from his appearance and his voice, which, as exhibited on the hearing on the present application has enough peculiarity in it to aid in identification. One of these witnesses, Poole, had known the man when he lived nearby in Carroll County. Betts produced six witnesses from Hagerstown, some of whom lived in the house with him, and some nearby; and they all testified to an alibi at the time of the robbery. Betts himself declined to take the stand.

It is sufficiently proved that Betts was unable to employ counsel. But in this case it must be said there was little for counsel to do on either side. The fact of the robbery [fol. 40] could hardly be disputed, as said. Betts briefly cross-examined the witnesses who identified him, and the situation seems to have been such that counsel could have done little more than prolong the cross-examination without advantage. And witnesses called by Betts needed no support by counsel. The problem presented to the trial court on the facts was a common one, and the decision of the judge, who saw the witnesses, could not be held wrong.

There was no helplessness in the accused. He is forty-three years old, and appears to have at least an ordinary amount of intelligence, and the ability to take care of his own interests on a trial of this narrow issue. I conclude that there is no such case as the Supreme Court of the United States would hold lacking in due process of law.

I have procured a transcript of the court stenographer's notes of the testimony at the trial, as I thought this necessary if the circumstances of the particular case were to be considered; and I make it part of the record on this application.

Counsel for both parties state that they do not wish any further argument before final action, and I shall therefore issue a formal writ, but sign an order declining to discharge the man from custody on it, and remanding him. The

record for an appeal I shall have to certify myself, as on an application for the writ of habeas corpus I am a judge without a court.

Carroll T. Bond.

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[fol. 41] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND

In the Matter of the Application of SMITH BETTS for the Writ of Habeas Corpus

ORDER—October 6, 1941

The application of Smith Betts for release from custody of the Warden of the Maryland State Penitentiary upon the writ of habeas corpus having come on to be heard upon the papers and testimony taken, it is this 6th day of October, 1941, ordered that the writ issue, but the parties agreeing that final action be taken upon the hearing so far had, without further hearing in this jurisdiction, it is further ordered that the said Smith Betts be and he is hereby remanded to the custody of the said Warden.

Carroll T. Bond, Judge.

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[fol. 42] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND

CERTIFICATE TO RECORD

STATE OF MARYLAND,
City of Baltimore, to wit:

I hereby certify that the aforegoing is a full and true copy of the docket entries and transcript of all papers filed with me as a Judge of the State of Maryland, being Chief Judge of the Court of Appeals of Maryland, one of the Courts of Record of the State of Maryland.

In witness whereof I hereto set my hand and affix my seal this 17th day of December 1941.

Carroll T. Bond, Chief Judge, Court of Appeals of Maryland.

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 16, 1942

The petition herein for a writ of certiorari to the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a judge of the Court of Appeals of Maryland from the City of Baltimore, is granted.

Counsel are requested on the argument of this case to discuss the jurisdiction of this Court, particularly (1) whether the decision below is that of a court within the meaning of Section 237 of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any other state court, have been exhausted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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# No. 837

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SMITH BETTS,

*Petitioner,*

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND.

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## PETITION FOR WRIT OF CERTIORARI TO CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE.

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WILLIAM L. MARBURY, JR.,
JESSE SLINGLUFF, JR.,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

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# No. 837

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SMITH BETTS,

*Petitioner,*

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND.

---

**PETITION FOR WRIT OF CERTIORARI TO CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE, AND BEING CHIEF JUDGE OF THE COURT OF APPEALS OF MARYLAND.**

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*May It Please the Court:*

The petition of Smith Betts, respectfully shows:

A.

**Summary Statement of the Matter Involved.**

The petitioner filed a petition for a Writ of *Habeas Corpus* before Judge Carroll T. Bond, a Judge of the Court of Appeals of Maryland, challenging the validity of a com-

mitment pursuant to which he was and is now being detained by the respondent. Judge Bond granted the writ and simultaneously entered an order, remanding petitioner to the custody of respondent. The purpose of the present petition is to have that order reviewed by this Court.

The order of Judge Bond disposed adversely of petitioner's claim that he had been denied the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution. That claim was based upon the following facts, which are stipulated (R. 6):

Petitioner was arraigned in the Circuit Court for Carroll County, Maryland, on a charge of robbery. At the time of his arraignment he advised the trial Judge that he could not afford to employ counsel, and requested that counsel be appointed to represent him. The trial Judge advised petitioner that it was the practice in his court to appoint counsel for indigent defendants only in cases where murder or rape was charged. Petitioner's request for the appointment of counsel was denied. Petitioner pleaded not guilty. Five days later he was tried and found guilty. He was then committed to the custody of respondent for a term of seven years.

Petitioner filed a petition for a writ of *habeas corpus* in the Circuit Court for Washington County. The Judge of that court granted the writ and after hearing, at which petitioner was not represented by counsel, directed that petitioner be remanded to the custody of respondent. Petitioner thereupon filed his petition with Judge Bond who, after hearing counsel, disposed of the petition in like manner. Judge Bond delivered an opinion (R. 26), upholding the validity of the commitment pursuant to which petitioner is being detained by respondent, and denying petitioner's claim based on the Federal Constitution.

This Court has jurisdiction pursuant to Section 237 of the Judicial Code as amended. The petition for a writ of *habeas corpus* presented a substantial claim based upon the Federal Constitution. This claim was finally disposed of by the decision of Judge Bond, from which no appeal is allowed by the laws of Maryland. *State* v. *Boyle*, 25 Md. 509; *Annapolis* v. *Howard*, 80 Md. 244; *Gall* v. *Brady*, 39 Fed. Supp. 504, 508. The petition was presented to Judge Bond as the Judge of the Court of Appeals of Maryland from Baltimore City, pursuant to express statutory authority. The pertinent provision is found in the *Code of Annotated Public General Laws of Maryland (Flack's 1939 Ed.)*, Article 42, Section 1, and reads as follows:

> "The court of appeals and the chief judge thereof shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters relating thereto throughout the whole State. The circuit courts for the respective counties of this State and the several judges thereof, out of court, the superior court of Baltimore City, the court of common pleas of said city, the circuit court and circuit court No. 2 of Baltimore City, and the Baltimore City court, and the judges of said several courts, out of court, and the judge of the court of appeals from the city of Baltimore, shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters pertaining thereto."

In *Sevinsky* v. *Wagus*, 76 Md. 335, that part of the statute which undertook to confer jurisdiction upon the Court of Appeals of Maryland or the Chief Judge thereof was held to be unconstitutional. At the same time the court reaffirmed the decision of *Ex Parte O'Neill*, 8 Md. 227, where it was held that any judge of the Court of Appeals had power to grant the writ of *Habeas Corpus*. It so happens that Judge Bond, in addition to being the Judge of the Court of Appeals from Baltimore City, is likewise Chief Judge of the court.

Although in such a proceeding, the Judge does not sit as the Judge of any court, it is obvious that he is performing a judicial function, and that proceedings before him constitute proceedings before a judicial tribunal. In view of the decision cited, it is likewise true that Judge Bond is the highest tribunal of the State before whom the petitioner could present his claim.

B.

**Reasons Assigned in Support of the Petition.**

The question presented is one which has not been directly disposed of by any decision of this Court. Recent cases, however, have given strong indications that this Court intends to hold that the Fourteenth Amendment requires that, upon request, counsel be furnished indigent defendants in criminal cases. *Powell* v. *Alabama*, 287 U. S. 45, p. 61; *Avery* v. *Alabama*, 308 U. S. 444; cf. *Smith* v. *O'Grady*, 312 U. S. 329. The question has already given rise to conflicting decisions in the lower Federal courts. *Boyd* v. *O'Grady*, 121 F. (2d) 146 (C. C. A. 8); *Achtien* v. *Dowd*, 117 F. (2d) 989 (C. C. A. 7); *Gall* v. *O'Grady*, 39 Fed. Supp. 504 (D. Md.); *Commonwealth* v. *Smith*, 11 A. (2d) 656 (Sup. Ct. Penna.).

The question is obviously one of great importance to the administration of justice. As such it not only justifies but requires the attention of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to Carroll T. Bond, a Judge of the State of Maryland, commanding him to certify, and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case of *Smith Betts, Petitioner*, v. *Patrick J. Brady, Warden of the*

*Penitentiary of Maryland, Respondent,* and that his judgment and order remanding Smith Betts to Patrick J. Brady, Warden, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray, &c.

WILLIAM L. MARBURY, JR.,
JESSE SLINGLUFF, JR.,
*Counsel for Petitioner.*

(8124)

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 837

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SMITH BETTS,

*Petitioner,*

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND.

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ON PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE.

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## SUPPLEMENTAL BRIEF OF PETITIONER.

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JESSE SLINGLUFF, JR.,
*Counsel for Petitioner.*

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 837

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SMITH BETTS,

*Petitioner,*

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND.

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ON PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND, FROM THE CITY OF BALTIMORE.

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## SUPPLEMENTAL BRIEF OF PETITIONER.

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Since the petition in the above entitled case was filed, there has been handed down a decision of the United States Circuit Court of Appeals for the Fourth Circuit, in the cases of *Charles Carey* v. *Patrick J. Brady, etc.*, and *Merrill L. Gall* v. *Patrick J. Brady, etc.* The citation of these two cases should be added to page 4 of the Petition

for a Writ of Certiorari in this case, after the citation of the case of *Gall* v. *O'Grady*, (Brady) 39 F. Sup. 504 (D. Md.). Since this decision has not yet appeared in the reports, a copy of the same is printed with this Supplemental Brief, for the convenience of this Court.

Respectfully submitted:

JESSE SLINGLUFF, JR.,
*Counsel for Petitioner.*

# United States Circuit Court of Appeals

FOURTH CIRCUIT.

No. 4851.

CHARLES CAREY,
*Appellant,*
*vs.*
PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,
*Appellee.*

No. 4853.

MERRILL L. GALL,
*Appellant,*
*vs.*
PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,
*Appellee.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

(Argued November 14, 1941. Decided January 12, 1942.)

Before Parker, Soper and Dobie, Circuit Judges.

G. Van Velsor Wolf for Appellants and Robert E. Clapp, Jr., Assistant Attorney General for Maryland, and Morton E. Rome, Assistant State's Attorney for Baltimore City;

(William C. Walsh, Attorney General for Maryland; J. Bernard Wells, State's Attorney for Baltimore City; Lawrence E. Ensor, State's Attorney for Baltimore County, and John Grason Turnbull, Assistant State's Attorney for Baltimore County, on brief) for Appellee.

Per Curiam:

These are appeals by petitioners in habeas corpus cases from orders denying their prayers for release and remanding them to the custody of the warden of the Maryland penitentiary. Petitioners in both cases were convicted in Maryland State courts of the crime of burglary and were sentenced to terms of three and five years respectively. The maximum sentence for burglary in Maryland is twenty years. Each prisoner petitioned the court below for a writ of habeas corpus after unsuccessful application to the State courts. The facts are fully stated in elaborate opinions filed by the judge of the lower court. See *Gall* v. *Brady*, 39 F. Supp. 504; *Carey* v. *Brady*, 39 F. Supp. 515.

In Carey's case, it appears that, upon arraignment, he requested that counsel be assigned him and was advised by the judge then sitting that it was not customary to assign counsel in cases of that character. His case came on for trial before another judge and he did not renew the request and no counsel was appointed to represent him. The same facts appear in Gall's case, except that he was charged with burglary in two indictments and after conviction under one of them he voluntarily pleaded guilty to the charge contained in the other. He was given in each case a sentence of five years to run concurrently with that imposed in the other. In neither of the cases before us was there anything to indicate that any advantage was taken of the petitioner by the prosecutors or anyone else, that any defenses were suppressed or inadequately pre-

sented, or that petitioner did not receive in all respects a fair and impartial trial at the hands of the court. The petitioners in both cases were mature men with substantial criminal records and presumably not unfamiliar with the processes of the courts. With respect to Carey the Judge found:

> "I find as a fact from the testimony in the case that Carey's trial before Judge Grason was in all respects fair and consistent with due process, unless the failure of Judge Lawrence to appoint counsel at Carey's request constituted lack of due process. I find that Carey did not request Judge Grason to appoint counsel for him or make any showing of facts from which Judge Grason should have made the appointment of counsel."

With respect to Gall, the finding was:

> "The only circumstance here presented which could possibly be considered as tending to show lack of due process is the failure to appoint counsel. The case is entirely devoid of associated facts, such as appeared in *Powell* v. *Alabama*, and *Smith* v. *O'Grady*, on which the respective decisions were based. Here the petitioner was indicted in the city of his residence, was surrounded by his relatives, had the opportunity to summon witnesses for his defense, freely elected to be tried by the judge without a jury, could have secured a further postponement of his case if he had asked for it, and had a trial which in itself was in all respects fair, and indeed is criticized only because of the absence of counsel. Whether counsel should be appointed in any particular Maryland criminal case is by the local statute committed to the judicial (but presumably appealable) discretion of the judge before whom the defendant appears. There is nothing in this case to show that this discretion was abused by either judge who touched the case; nor does it appear that the circumstance of the petitioner's case in this respect is different from many hundreds of substantially similar

cases which have been tried in the Criminal Court of Baltimore in recent years, in accordance with the practice prevailing for at least fifty years."

We agree with the judge below that, in view of the contention of petitioners that they had been denied due process and had exhausted their remedies in the courts of the State of Maryland, it was proper for him to issue the writ of habeas corpus for the purpose of inquiring into the legality of their imprisonment. *Frank* v. *Mangum*, 237 U. S. 309, 327; *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103. We agree also that there was nothing in the evidence before him to show that either of the petitioners was denied due process, unless the failure to appoint counsel for them amounted of itself to such denial. On this question, the members of the court, after carefully studying the decisions of the Supreme Court in *Powell* v. *Alabama*, 287 U. S. 45, *Johnson* v. *Zerbst*, 304 U. S. 458, *Palko* v. *Connecticut*, 302 U. S. 319, 327, *Lisenba* v. *California*, — U. S. —, 62 S. Ct. 280 (decided Dec. 8, 1941), *Walker* v. *Johnston*, 312 U. S. 275, and a number of other recent decisions are divided and in doubt. One member of the court is of the opinion that the mere failure of the State Court, upon request, to appoint counsel for an indigent prisoner does not amount to a denial of due process in the absence of other circumstances showing that such appointment is necessary to a fair trial, such as the youth and inexperience of the prisoner or complicated nature of the charge, the inflamed state of the public mind, acts of oppression on the part of public officers, &c., and that if such failure to appoint counsel should be held to be a denial of due process, it is not such a denial as would destroy the jurisdiction of the court to proceed with the trial of the case. Another member of the court is of the view that such failure to appoint counsel is a denial of due process that

would justify a reversal of the judgment upon appeal, but is not sufficient of itself to destroy the jurisdiction of the court and authorize the release of the prisoner, after sentence, on habeas corpus. The third member of the court is of the opinion that such a failure is of itself a denial of due process that destroys the jurisdiction of the court and entitles the prisoner to release on habeas corpus. Widespread confusion seems also to exist in the minds of judges and lawyers throughout the country with regard to these questions. See, *Wilson* v. *Lanagan*, 1 Cir., 99 F. (2d) 544, cert. den. 306 U. S. 634; *Sanford* v. *Robbins*, 5 Cir., 115 F. (2d) 435, cert. den. 213 U. S. 697; *Boyd* v. *O'Grady*, 8 Cir., 121 F. (2d) 146.

In view of the conflicting views of the members of this court on this appeal, it is obvious that no opinion can be written that will be useful as an authoritative precedent upon the questions involved; but as it is the opinion of the majority of the court that the State Court did not lose jurisdiction by the failure to appoint counsel for the prisoners, it follows that the order of the District Court dismissing the petition for writ of habeas corpus must be affirmed in each case.

The court acknowledges its indebtedness to Mr. G. Van Velsor Wolf of the Baltimore Bar, who was appointed by the court to present the cause of appellants, and who has discharged that duty ably and conscientiously.

Affirmed.

A true copy, Teste:

_____,
*Clerk, U. S. Circuit Court of Appeals, 4th Circuit.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 837.

SMITH BETTS,

*Petitioner,*

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND.

ON WRIT OF CERTIORARI TO THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE.

## BRIEF OF PETITIONER.

JESSE SLINGLUFF, JR.,
G. VAN VELSOR WOLF,
Counsel for the Petitioner.

The Daily Record Co. Print, Baltimore.

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IN THE

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ON WRIT OF CERTIORARI TO THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE.

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## BRIEF OF PETITIONER.

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### I.

### OPINION OF THE COURT BELOW

The opinion of Judge Carroll T. Bond is not officially reported. It appears in the Record at page 26.

## II.
## JURISDICTION.

These proceedings were originally instituted by the filing of a petition for a writ of *habeas corpus* before the Honorable Carroll T. Bond, Judge, on August 29, 1941. Judge Bond had jurisdiction in the case, and properly granted the writ for a consideration on its merits.

On October 6, 1941, Judge Bond remanded the petitioner to the custody of the respondent, and to review his decision, a petition for a writ of certiorari was filed in this court on January 3, 1942. Certiorari was granted on February 16, 1942.

The jurisdiction to review the decision of Judge Bond on writ of certiorari is conferred upon this court by Section 237(b) of the Judicial Code as amended by the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 937, U. S. C. Tit. 28, sec. 344(b). It is contended by the petitioner that the judgment is reviewable in that it decided adversely to the petitioner a substantial federal question involving his rights under the Fourteenth Amendment to the Constitution of the United States, which question was properly presented by the record.

## III.
## STATUTORY PROVISIONS INVOLVED.

The power to hear and decide the case was conferred on Judge Bond by Article 4, Sec. 6 of the Constitution of the State of Maryland, reading as follows:

> "All Judges shall by virtue of their offices be Conservators of the Peace throughout the State; and no fees, or perquisites, commission or reward of any kind, shall be allowed to any Judge in this State, besides his annual salary, for the discharge of any Judicial duty."

Article 42 of the PUBLIC GENERAL LAWS OF MARYLAND (Flack's 1939 Ed.) prescribes the practice and procedure in *habeas corpus* cases in Maryland. The pertinent sections of that Article read as follows:

"1. The court of appeals and the chief judge thereof shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters relating thereto throughout the whole State. The circuit courts for the respective counties of this State, and the several judges thereof out of court, the superior court of Baltimore City, the court of common pleas of said city, the circuit court and circuit court No. 2 of Baltimore City, and the Baltimore City court, and the judges of said several courts, out of court, and the judge of the court of appeals from the city of Baltimore, shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters pertaining thereto.

"2. The writ of *habeas corpus* may and shall be granted by any of said courts, or by any of the judges mentioned in the preceding section, whether in term or vacation, upon application being made as herein directed."

"3. [As amended by Laws of Maryland, 1941, c. 484] Any person committed, detained, confined or restrained from his lawful liberty within this State for any alleged offense or under any color or pretense whatsoever, or any person in his or her behalf, may complain to the Court or judge having jurisdiction and power to grant the writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement or restraint may be inquired into; and the said respective courts or judges to whom such complaint is so made shall, unless it appears from the complaint itself or the documents annexed that the petitioner would not be entitled to any relief, forthwith grant the writ of habeas corpus, directed to the officer or other person in whose custody or keeping the party so de-

tained shall be, returnable immediately before the said court or judge granting the same.

"4. The writ of *habeas corpus* shall be served by delivering to the officer or other person to whom it is directed, or by leaving it at the prison or place in which the party suing it out is detained; and such officer or other person shall forthwith or within such reasonable time (not exceeding three days after such service), as the court or judge shall direct, make return of the writ, and cause the person detained to be brought before the court or judge, according to the command of the writ; and shall likewise certify the true causes of his detainer or imprisonment, if any, or under what color or pretense such person is confined or restrained of his liberty.

"5. On any application for a *habeas corpus*, if it shall be made to appear to the satisfaction of the court or judge that there is probable cause for believing that the person who may be charged with confining or detaining the person making the application, or on whose behalf the same is made, is about to remove the person so detained from the place where he may then be confined or detained, for the purpose of evading any writ of *habeas corpus*, or for other purpose, or that the person charged as aforesaid would evade or not obey any such writ, then the court or judge shall insert in the writ of *habeas corpus* a clause commanding the sheriff of the county in which the person charged as aforesaid may be, to serve the writ on the person to whom the same may be directed, and to cause the said person immediately to be and appear before the said court or judge, together with the person so confined or detained.

"6. It shall be the duty of the sheriff to whom the writ mentioned in the preceding section may be delivered immediately to execute the same and to carry the person charged with the detention, together with the person detained, before the court or judge, who shall proceed to inquire into the subject-matter.

* * * * * *

"9. Any person committed or detained, or any person in his behalf, may demand a true copy of the warrant of commitment or detainer; and any officer or other person who shall neglect or refuse to deliver a true copy of the warrant of commitment or detainer, if any there be, within six hours after the same shall have been demanded, shall forfeit to the person detained five hundred dollars. The right of action to recover which or to recover the forfeiture in the next preceding section shall not cease by the death of either or both of the parties.

"10. On the return of a writ of *habeas corpus*, and producing the person detained and the cause of detention before the court or judge who granted the writ, the court or judge shall immediately inquire into the legality and propriety of such confinement or detention, and if it shall appear that such person is detained without legal warrant or authority he shall immediately be released or discharged, or if the court or judge shall deem his detention to be lawful and proper he shall be remanded to the same custody, or admitted to bail if his offense be bailable, and if bailed the court or judge shall take a recognizance to answer in the proper court and shall transmit the same to such court.

"11. Any person at whose instance or in whose behalf a writ of *habeas corpus* has been issued may controvert by himself or his counsel the truth of the return thereto or may plead any matter by which it may appear that there is not a sufficient legal cause for his detention or confinement, and the court or judge, on the application of the party complaining or the officer or other person, making the return shall issue process for witnesses or writings returnable at a time and place to be named in such process, which shall be served and enforced in like manner as similar process from courts of law is served and enforced, but before issuing such process the court or judge shall be satisfied by affidavit or otherwise of the materiality of such testimony.

"12. If the court granting the said writ of *habeas corpus* shall not be in session at the return thereof or if the judge granting the said writ of *habeas corpus* shall be absent at the return thereof the said writ shall be returned before any court or judge which or who would originally have had power or jurisdiction to issue such writ under the provisions of sections 1 and 3 if application in the particular case had been originally made to such court or judge.

* * * * * * *

"17. Whenever application shall be made for a writ of *habeas corpus* to inquire into the cause of detention of any person, who shall be confined in any penal institution in this State, it shall be the duty of the Judge granting said writ, upon fixing the time for hearing, to instruct the clerk of the court in which such judge shall then be sitting, to give such notice of the time and place of such hearing to the State's Attorney for the county or city from which such person shall have been committed to such penal institution as will enable such State's Attorney to attend such hearing on behalf of the State."

**RULES OF THE COURT OF APPEALS OF MARYLAND.**

Rule 25, Sec. 1. In criminal cases an appeal or writ of error allowed by law shall be taken within ten days from the date of the judgment or sentence.

## IV.

## STATEMENT OF THE CASE.

This case presents the simple question of whether the Fourteenth Amendment to the Constitution of the United States requires the appointment of counsel to represent indigent persons accused of crime in State courts.

The petitioner filed a petition for a writ of *habeas corpus*, raising the above question before the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a Judge of

the Court of Appeals of Maryland from the City of Baltimore (R. 1). Judge Bond decided that question adversely to the petitioner and ordered the petitioner to be remanded to the custody of the Warden of the Maryland State Penitentiary. The case is now before this Court to review that order.

On May 9, 1939, the petitioner was presented and indicted for robbery in the Circuit Court for Carroll County, Maryland. On May 12, 1939, he was arraigned and pleaded "not guilty" (R. 8). The petitioner was arraigned before Judge William H. Forsythe and at that time the petitioner advised the court that he could not afford counsel to represent him and he requested that counsel be appointed for him (R. 6, 7). Judge Forsythe advised the petitioner that he would not appoint counsel for him in his case because it was the practice in Carroll County to appoint counsel for indigent defendants only in cases of murder and rape (R. 7). The petitioner was unable to employ counsel (R. 30) due to lack of funds, and no counsel was appointed for him by the court.

On May 17, 1939, the petitioner's case was called for trial. He elected to be tried by the court without a jury. On the same day there was a verdict of guilty, judgment, and a sentence that the petitioner be confined to the Maryland State Penitentiary for a period of eight years (R. 8). At no time during the proceeding did the petitioner waive his right to counsel.

The petitioner, on June 5, 1941, *in propria persona*, filed a petition for a writ of *habeas corpus* before the Honorable Joseph D. Mish, a Judge of the State of Maryland, raising the same question later raised before Judge Bond (R. 26). The writ was granted the same day. After a hearing the petitioner's contention was rejected and he was remanded to the custody of the warden (R. 25).

On August 29, 1941, and while serving the said term, the petitioner filed a second petition for a writ of *habeas corpus*. It was filed before the Honorable Carroll T. Bond, a Judge of the State of Maryland, and stated that the petitioner was being illegally detained in the Maryland State Penitentiary because his commitment was based upon a void and illegal judgment in that it was obtained in a manner contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States as the petitioner had been denied the appointment of counsel (R. 1, 2). An answer was filed with Judge Bond by the warden of the penitentiary (R. 4).

On September 26, 1941, a full hearing was held before Judge Bond, testimony was taken, an agreed statement or stipulation of facts was filed, and counsel argued the case (R. 6, 7).

On October 6, 1941, Judge Bond filed his opinion in the case (R. 26) and signed an order which granted the writ but denied the petitioner his release and remanded him to the custody of the respondent (R. 31).

A petition for a writ of certiorari to the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore, was filed in this Court on January 3, 1942, and said petition was granted by this Court on February 16, 1942 (R. 32).

## V.

## SPECIFICATIONS OF ERROR.

1. Judge Bond erred in failing to hold that the judgment entered by the Circuit Court for Carroll County was wholly void because of the refusal of the court to appoint counsel for the petitioner at his request.

2. Judge Bond erred in failing to hold that the petitioner was entitled to be released from the custody of the respondent because held under a commitment issued on a judgment obtained in violation of the guaranty of due process of law contained in the Fourteenth Amendment to the Constitution of the United States.

## VI.

## SUMMARY OF ARGUMENT.

*Point A. This Court has jurisdiction to review the order of Judge Bond in accordince with the provisions of Section 237(b) of the Judicial Code as amended.*

1. The decision below is that of a "court" within the meaning of Section 237(b) of the Judicial Code. Judge Bond was sitting as a "court" within the meaning of Section 237(b) of the Judicial Code because he sat as a judicial tribunal, followed judicial procedure fixed by statute, was bound to adjudge the rights of parties in accordance with law and had the power to and did enter a final judgment or decree.

2. The remedies afforded the petitioner by the State of Maryland have been exhausted. The time to appeal from the judgment of conviction has expired, and no review can be had in the State of Maryland of the decision of Judge Bond.

*Point B. The Fourteenth Amendment requires the appointment of counsel to represent indigent persons accused of crimes in State courts.*

The Fourteenth Amendment provides that a person shall not be deprived of his liberty without due process of law, and a necessary component of due process of law in a criminal trial is the right of an indigent prisoner to have counsel appointed to advise and represent him if he so desires.

*Point C. A prisoner for whom counsel has not been appointed at his request is entitled to his release under a petition for a writ of habeas corpus.*

Where a State court has failed to appoint counsel upon an indigent prisoner's request, it has no further jurisdiction to proceed with the trial. Any conviction or sentence resulting therefrom is void, and any commitment is illegal. Any prisoner so illegally detained should be released on his petition for a writ of *habeas corpus*.

## ARGUMENT.

### POINT A.

### THIS COURT HAS JURISDICTION TO REVIEW THE ORDER OF JUDGE BOND IN ACCORDANCE WITH THE PROVISIONS OF SECTION 237(b) OF THE JUDICIAL CODE AS AMENDED.

#### *1. The decision below is that of a court within the meaning of section 237(b) of the Judicial Code.*

It is provided in Section 237(b) of the Judicial Code that it shall be competent for this Court by certiorari to review any final judgment or decree "rendered or passed by the highest Court of a State in which a decision could be had . . . where any title, right, privilege, or immunity, specially set up or claimed by either party under the Constitution . . . of . . . the United States . . . is denied." It is submitted that the decision of Judge Bond was the decision of a court within the meaning of that section.

This Court has held that the words "court" and "judge" may be used interchangeably in statutes. In *The United States, Petitioner*, 194 U.S. 194, in which Section 13, of the Chinese Exclusion Act of 1888, 25 Stat. 476, c. 1015, was under consideration, it was held that the appeal allowed by Section 13 from the decision of a commissioner "to the judge of the District Court for the district" meant an appeal to the District Court.

In *Craig v. Hecht*, 263 U.S. 255, the jurisdiction of the Circuit Court of Appeals to hear an appeal from the order of a district judge in a *habeas corpus* case was sustained, where the statute involved (Section 4 of the Judiciary Act of March, 1891) read:

> ". . . No appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeal, by writ of error or otherwise, from said district courts, shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established . . ."

In both of these cases this court held that the intent of Congress was to use the word "court" interchangeably with the word "judge" and to hold otherwise would defeat the purpose of the statutes involved.

Certainly the purpose of Section 237(b) of the Judicial Code is to give this Court jurisdiction to review the judgments or decrees of the highest judicial tribunals of each State where federal constitutional questions have been finally decided.

The material wording involved in Section 237(b) dates back to the original Judiciary Act of 1789. The intent of Congress to create this Court, and to confer jurisdiction thereon in order to carry out the mandate of Article III, Section 2 of the Constitution of the United States is clearly and fully discussed in *Martin v. Hunter's Lessee*, 1 Wheat. 304. In particular it was there held that under the Constitution the appellate power of this Court extends to *all* cases arising under the Constitution. "It is the case, then, and not the court, that gives the jurisdiction" (p. 338).

Furthermore it was held at page 331 that:

> ". . . the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority."

It was to carry out the Constitutional mandate that the original Judiciary Act of 1789 was passed and by which there was conferred on this Court appellate jurisdiction in certain classes of cases including final judgments and decrees in any suit in the highest court of a State in which a decision could be had and in which a question arising under the Federal Constitution had been decided.

Certainly with that purpose to be carried out it would seem improbable that Congress in passing the Judiciary Act of 1789 meant to leave out of the appellate jurisdiction of this Court decisions of State judges when acting as the highest judicial tribunals of the State but not called by the name "court." And if it be held that the word "court" as used in the Judiciary Act of 1789 included "judge," then the same construction would apply to Section 237(b), because the identical phrase "highest court of a State" is used in every subsequent Judiciary Act.

The doubt that the decision of Judge Bond is that of a court within the meaning of Section 237(b) of the Judicial Code is raised by the line of cases beginning with *McKnight v. James*, 155 U. S. 685. In construing a similar provision of an earlier Judicial Code, it was held in these cases that the Supreme Court of the United States lacked jurisdiction to grant a writ of error to a judge in chambers, because a judge in chambers was not a "court" within the meaning of the Code.

In *McKnight v. James*, *supra*, a petition for a writ of *habeas corpus* was filed with a judge in chambers of a lower Ohio court. Upon being remanded the petitioner sought to have a writ of error issue from this Court to that judge, contending that this Court had jurisdiction under Rev. Stat., Sec. 709, to issue a writ to the judge in chambers.

But the contention of the petitioner in *McKnight v. James* was fatally inconsistent. He insisted that for the purposes of the Ohio State law a judge in chambers was not a court and therefore the judge's decision was not reviewable by the highest court of Ohio. On the other hand he contended that for the purposes of Section 709 of the Revised Statutes the judge in chambers was a court and therefore, that this Court had jurisdiction to review the judge's order on a writ of error. The fallacy of such a posion was obvious and this Court properly declined to hear his case.

There was a further objection to the acceptance of jurisdiction in that case, namely, the petitioner had addressed his petition for a writ of *habeas corpus* to a judge in chambers for the apparent purpose of avoiding a review thereof by that State's highest court.

The holding of the *McKnight* case, and the cases following it, is explained in *Craig v. Hecht,* 263 U. S. 255, at page 276, where it is said:

> "The . . . cases go no further than to hold that appeals do not lie to this Court from orders by judges at chambers."

This, it is submitted, is sound. But, the contention here made is that the order of Judge Bond was not the order of a judge at chambers.

In the present case, Judge Bond had all the attributes of a court. His order was final, i.e. he could make a decision, *Ableman v. Booth,* 21 How. 506; *Bryant v. Zimmerman,* 278 U. S. 63. The ability of a judicial tribunal to make a decision was considered as one of the elementary characteristics of a "court" in *Olney v. Arnold,* 3 Dall. 308, in which this Court decided that the General Assembly of Rhode Island was not a court within the meaning of the Judiciary

Act of 1789 because, although it could set aside, it could not make, a decision.

The power to issue the writ of *habeas corpus* as a conservator of the peace was conferred on Judge Bond by Art. 4, Sec. 6, of the State Constitution. *Sevinskey v. Wagus*, 76 Md. 335, 336. But the procedure which Judge Bond was bound to follow is prescribed by Article 42 of the PUBLIC GENERAL LAWS OF MARYLAND (Flack's 1939 Ed. as amended by the Laws of Maryland, 1941, c. 484), the pertinent provisions of which appear above at pages 3 to 6.

That procedure, fixed by statute, is adversary and requires due notice by service of process on the opposing party, opportunity to file an answer, the right to subpoena witnesses, to take testimony and to be heard on the law. It finally requires an adjudication. It is of particular significance that the procedure which Judge Bond, sitting as a judge, must follow, is identical under the Maryland practice with the procedure which a court must follow.

Accordingly, therefore, Judge Bond, in the present case, filled all of the requirements of a court, and fulfilling all such requirements in making his decision, that decision should be held to be one of a court within the meaning of Sec. 237(b).

***2. The remedies afforded the petitioner by the State of Maryland have been exhausted.***

The petitioner contends that his State remedies have been exhausted. The ten days allowed for taking an appeal from his original conviction have long since elapsed, see Rule 25 of the Rules of the Court of Appeals of Maryland at page 6 hereof.

Furthermore, the decision of Judge Bond could not be appealed, *Petition of Otho Jones*, 179 Md. 240, 16 A. (2d) 901; *State v. Glenn*, 54 Md. 572; *Annapolis v. Howard*, 80 Md. 244, 30 Atl. 910; *Ex Parte O'Neill*, 8 Md. 227; nor could

the Court of Appeals of Maryland have issued a writ of *habeas corpus*. *Sevinskey v. Wagus*, 76 Md. 335, 25 Atl. 468; see *Hendrick v. State*, 115 Md. 552, 81 Atl. 18.

It is true that the petitioner could have applied for successive writs with every judge and court in the State, and even with the same judges over and over again, raising the same point in each petition, *State v. Glenn, supra; Bell v. State*, 4 Gill 301, 304, and see Judge Bond's opinion (R. 26). But it would exhaust both the petitioner and the respondent to do so and would accomplish no purpose other than an harassment of the judiciary. Furthermore, there could be no appeal in Maryland from any other judge *or* court, see cases *supra*.

It appears from the record in this case that the judges and courts of Carroll County would decide adversely to the petitioner's contention (R. 7). Also the petitioner had already presented the same point to Judge Mish in Washington County and he had ruled adversely thereon (R. 25, 26).

The records in *Gall v. Brady* (D. Md.), 125 F. (2d) 253, 39 F. Supp. 504, and *Carey v. Brady* (D. Md.), 125 F. (2d) 253, 39 F. Supp. 515, which are now before this Court on petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit, being Nos. 937 & 938, October Term 1941, show that other Maryland State judges and courts have rejected the proposition that counsel must be appointed for indigent prisoners.

It is submitted therefore that all State remedies have been exhausted. In fact, the federal district court in Maryland in the *Gall* and *Carey* cases, *supra*, has come to the same conclusion, which decisions were affirmed by the Circuit Court of Appeals for the Fourth Circuit in *Carey v. Brady*, 125 F. (2d) 253. Thus, no further relief can be granted this petitioner except in this Court.

## Point B.

### THE FOURTEENTH AMENDMENT REQUIRES THE APPOINTMENT OF COUNSEL TO REPRESENT INDIGENT PERSONS ACCUSED OF CRIMES IN STATE COURTS.

This Court has held that the Sixth Amendment to the Constitution of the United States requires the appointment of competent counsel to represent indigent prisoners in federal courts, regardless of the nature of the alleged crime. *Walker v. Johnston*, 312 U. S. 275; *Johnson v. Zerbst*, 304 U. S. 458. Even an attorney who has had considerable experience in criminal courts as an assistant United States attorney is entitled to the services of separate counsel to represent him alone. *Glasser v. United States*, — U. S. —, 86 L. Ed. 405, 62 S. Ct. 457.

It is respectfully submitted that a similar protection is afforded indigent prisoners in State courts through the protective provisions of the Fourteenth Amendment. This conclusion is based upon several decisions of this Court following the case of *Powell v. Alabama*, 287 U. S. 45, in which it was held that the right of a prisoner in a State court, at least in a capital case, to have counsel appointed for him by the court is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment.

In *Avery v. Alabama*, 308 U. S. 444, Mr. Justice Black speaking for this Court in a case involving the question of the appointment of counsel by a State court in a capital case, and citing the *Powell* case, said at page 445:

> "Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required a reversal of his conviction."

Other decisions of this Court have indicated that this very protection of the Sixth Amendment to prisoners on trial in federal courts is extended through the provisions of the Fourteenth Amendment to prisoners on trial in State courts. *Grosjean v. American Press Co.*, 297 U. S. 233, 243, 244; *Palko v. Connecticut*, 302 U. S. 319, 324; *Johnson v. Zerbst*, 304 U. S. 458, 463. See also *Boyd v. O'Grady*, (CCA 8), 121 F. (2d) 146, 148; *Ex Parte Murphy* (E. D. Wis.), 35 F. Supp. 473, 474.

It is true that the Fourteenth Amendment does not contain the specific words contained in the Sixth Amendment that a prisoner is entitled "to have the Assistance of Counsel for his defense." However, it has been held by this Court that many of the rights protected against federal invasion by specific provisions of the bill of rights have been equally protected against State invasion by the general terms "due process of law" of the Fourteenth Amendment. After illustrating how certain provisions of the original bill of rights are not extended through the Fourteenth Amendment as prohibitions on State activity, Mr. Justice CARDOZO in *Palko v. Connecticut*, 302 U. S. 319, said at page 324:

> "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress . . .; or the like freedom of the press . . .; or the free exercise of religion . . .; or the right of peaceable assembly, without which speech would be unduly trammeled . . .; *or the right of one accused of crime to the benefit of counsel, Powell v. Alabama*, 287 U. S. 45. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the

concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." (Emphasis supplied.)

Likewise, in *Grosjean v. American Press Co.*, 297 U. S. 233, this Court, speaking through Mr. Justice SUTHERLAND, said at page 243 in referring to its decision in *Powell v. Alabama, supra:*

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, *and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.*" (Italics supplied.)

The most recent decision of this Court dealing with the appointment of counsel in State courts is *Smith v. O'Grady*, 312 U. S. 329, in which the petitioner claimed that he was entitled to his release on a petition for a writ of *habeas corpus* because he had been denied due process of law in his trial on a charge of burglary with explosives, in a criminal court of the State of Nebraska. In reversing the Supreme Court of the State of Nebraska, this Court, speaking through Mr. Justice BLACK, reviewed the claims of the petitioner, including "that his request for the benefit and advice of counsel had been denied by the court", and said at page 334:

> "If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guarantees protected against state invasion through the Fourteenth Amendment."

As authority for the above quotation this Court referred to *Walker v. Johnston*, 312 U. S. 275, and *Johnson v. Zerbst*, 304 U. S 458, the two leading cases to the effect that the Sixth Amendment secures to prisoners in federal courts

the appointment of counsel, regardless of the nature of the charge. The inference that the Sixth and Fourteenth Amendments extend this same protection in federal and State courts, respectively, is apparent.

The necessity of counsel to due process is not the result of any technical interpretation of constitutional language but is merely a conclusion drawn from the broad and humane general principles of law. This is clearly set forth in the opinion of the Court in *Johnson v. Zerbst, supra,* at page 463, as follows:

> "That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment *and other parts of our fundamental charter,* this Court has pointed to '. . . the humane policy of the modern criminal law . . .' which now provides that a defendant '. . . if he be poor . . . may have counsel furnished him by the State . . . not infrequently . . . more able than the attorney for the State.'" (Italics supplied.)

It has been argued that although this Court may be said to have extended the provisions of the Fourteenth Amendment to include the right to the appointment of counsel to prisoners in State courts, nevertheless this right is confined to cases involving the possibility of capital punishment only. Both *Powell v. Alabama, supra,* and *Avery v. Alabama, supra,* were capital cases. However, no such distinction was made in the case of *Smith v. O'Grady, supra,* where the charge involved, at most, imprisonment for a period of years. And certainly no such distinction is made in the application of the Sixth Amendment to the appointment of counsel in federal courts, *Johnson v. Zerbst,* 304 U. S. 458 (charge of possessing and uttering counterfeit money). For a decision of a State court see *Commonwealth v. Smith* (Pa. Super. Ct.), 11 A. (2d) 656.

In fact, in the most recent decision involving the appointment of counsel by the criminal courts of the State of Maryland, *Carey v. Brady*, 125 F. (2d) 253, a majority of the Circuit Court of Appeals for the Fourth Circuit held that the failure of the State courts to appoint counsel in cases of simple burglary amounted to a denial of due process of law although the charges involved, at most, possible sentences of imprisonment for a limited number of years.

It is respectfully submitted that there is no reasonable nor logical basis for any such distinction in view of the fact that the Fourteenth Amendment provides that a State shall not deprive any person of *life or liberty* without due process of law. The artistry, complexities and mysteries of judicial proceedings are no less where the prisoner faces imprisonment than where he faces death.

Of course, if the prisoner can afford to employ counsel there should be no obligation on the court to make an appointment, *Watkins v. Commonwealth*, 174 Va. 518, 6 S. E. (2d) 670; but where he is a pauper, and is admitted to be so, as in the case at bar, his need for the appointment of counsel, where he requests it, is apparent, if justice is to be done.

The basis upon which this Court has proceeded in its determination that the appointment of counsel is necessary to due process of law is clearly stated by the Court speaking through Mr. Justice SUTHERLAND in *Powell v. Alabama*, 287 U. S. 45, at pages 68 and 69, and quoted in full at page 463 of *Johnson v. Zerbst*, 304 U. S. 458, as follows:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, gen-

> erally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Certainly such language does not admit of any difference in its application to trials in which capital offenses are involved rather than to those which may result merely in imprisonment, perhaps for life. Further, in *Johnson v. Zerbst, supra,* at page 462, this Court has said of the constitutional safeguards of the Sixth Amendment which in principle are identical to those of the Fourteenth Amendment insofar as the appointment of counsel is concerned:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his *life or liberty,* wherein the prosecution is presented by experienced and learned counsel." (Italics supplied.)

Judge Bond, in his opinion (R. 30), says that the petitioner was fairly tried. The only issue involved was the identity of the petitioner and the evidence clearly identified him. It is to be presumed that a reading of a record in any criminal case would normally support the finding of the trial court. But the presentation of a *prima facie* case does not undeniably prove a prisoner's guilt. The petitioner contends he was innocent. Had he been allowed the representation of some experienced person who would have

recognized and presented other facts of significance, but ignored by the prosecution, and who could have searchingly examined the identifying witnesses, perhaps the record might have been different. Nor can the trial judge adequately protect a prisoner's interests, regardless of the highest motives and most sincere efforts. *Powell v. Alabama*, 287 U. S. 45, 61.

## POINT C.

### THE FAILURE OF THE COURT TO APPOINT COUNSEL DEPRIVED THE COURT OF ITS JURISDICTION AND RENDERED ITS SENTENCE AND CONVICTION VOID.

It has been held by this Court that the denial to a prisoner of the due process of law secured to him by the provisions of the Fourteenth Amendment, destroys the jurisdiction of the trial court and renders void a judgment of conviction and sentence based thereon. *Brown v. Mississippi*, 297 U. S. 278, 287; *Chambers v. Florida*, 309 U. S. 227. It has likewise been repeatedly held that as a consequence of such a denial of due process a prisoner so committed is entitled to his release on a petition for a writ of *habeas corpus*. *Frank v. Mangum*, 237 U. S. 309; *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Smith v. O'Grady*, 312 U. S. 329.

In *Boyd v. O'Grady*, 121 F. (2d) 146, the Circuit Court of Appeals for the Eighth Circuit specifically held that "the procedural guaranty of the Sixth Amendment of the Federal Constitution is protected against State invasion through the Fourteenth Amendment," and, therefore, that if a prisoner in a State court is denied the appointment of counsel, he is entitled to his release on petition for *habeas corpus*.

It is true that a majority of the Circuit Court of Appeals for the Fourth Circuit recently held in *Carey v. Brady*, 125

F. (2d) 253, that, although the failure of a State court to appoint counsel is a denial of due process, nevertheless, it does not destroy the jurisdiction of the trial court but is merely error which can be taken advantage of only on appeal. However, it is respectfully submitted that not only is such a conclusion directly contrary to the unanimous holdings of the above cases, but if that should be the law, there would be, as a practical matter, no substantial constitutional protection for an indigent prisoner.

The petitioner could have taken an appeal from his judgment of conviction, but Rule 25 of the Rules of the Court of Appeals of Maryland (see page 6 hereof) provides that such appeal must be taken "within ten days from the date of the judgment or sentence." As the petitioner had been unable to obtain counsel, because of lack of funds, from the time of his apprehension until the date of his trial, it is hardly probable that within the permissible period succeeding his conviction any change of circumstances would occur; and without counsel he would neither realize that he could take advantage of the error nor know how to proceed.

In specifically approving the writ of *habeas corpus* as a method of correcting the error of a federal court in failing to appoint counsel for an indigent prisoner this Court said in *Johnson v. Zerbst*, 304 U. S. 458, at page 465:

> "True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human *life and liberty*." (Emphasis supplied.)

## CONCLUSION.

It is therefore respectfully submitted that the order of the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore, should be reversed and that the petitioner should be granted his release on his petition for a writ of *habeas corpus*.

JESSE SLINGLUFF, JR.,

G. VAN VELSOR WOLF,
Counsel for the Petitioner.

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 837.

SMITH BETTS,

*Petitioner,*

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND,

*Respondent.*

## BRIEF OF RESPONDENT.

WILLIAM C. WALSH,
Attorney General,
ROBERT E. CLAPP, JR.,
Assistant Attorney General,
J. BERNARD WELLS,
State's Attorney for Baltimore City,
MORTON E. ROME,
Assistant State's Attorney for Baltimore City,
Attorneys for Respondent.

The Daily Record Co. Print, Baltimore.

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# Supreme Court of the United States

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No. 837.

SMITH BETTS, *Petitioner,*

*vs.*

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND, *Respondent.*

## BRIEF OF RESPONDENT.

### NATURE OF THE CASE.

This case is before the Court on the granting of a writ of certiorari to the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, and one of the Judges of the State of Maryland, who, acting as such Judge, declined to release the Petitioner in an habeas corpus proceeding and remanded the Petitioner to the custody of the Respondent.

### THE OPINION BELOW.

There is no official report of the Honorable Carroll T. Bond in these proceedings, but an opinion was rendered by him and is set forth in the Transcript of the Record filed in these proceedings, at pages 26-31.

## THE JURISDICTION OF THIS COURT.

The Petitioner claims that this Court has jurisdiction to review the proceedings before the Honorable Carroll T. Bond under the provisions of Section 237 of the Judicial Code; 28 U. S. C. A. 344. Certiorari was granted by this Court on February 16, 1942, — U. S. —, 86 L. Ed. (Advance Sheets) 564, with the request that counsel, on the argument of this case, "discuss the jurisdiction of this Court, particularly (1) whether the decision below is that of a court within the meaning of Section 237 of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any state court, have been exhausted."

## STATEMENT OF THE CASE.

The Respondent adopts the statement of the case as contained in the Brief of the Petitioner.

## QUESTIONS IN CONTROVERSY.

I.

Does this Court have jurisdiction to review an order of a State judge entered in an habeas corpus proceeding, remanding a prisoner to custody?

(a) Was the decision below that of a "court" within the meaning of Section 237 of the Judicial Code?

(b) Has the Petitioner, either by appeal or by application to other judges or any other State Court, exhausted his State remedies?

II.

Does the Fourteenth Amendment to the Constitution of the United States require a State court, on habeas corpus, to release a prisoner confined under the sentence of a State court of general jurisdiction after conviction of a crime

less than capital, solely because the prisoner was indigent and unable to procure counsel, where the State court, though requested, declined to appoint counsel for him?

(a) Does the Fourteenth Amendment to the Constitution of the United States require the appointment of counsel for indigent prisoners by State courts where such prisoners are charged with crimes less than capital?

(b) Is the judgment of a State court convicting a prisoner of a crime less than capital void, where the prisoner is indigent and unable to procure counsel, and where the State court, though requested, declined to appoint counsel for him?

## ARGUMENT.

### I.

### DOES THIS COURT HAVE JURISDICTION TO REVIEW AN ORDER OF A STATE JUDGE ENTERED IN AN HABEAS CORPUS PROCEEDING, REMANDING A PRISONER TO CUSTODY?

***(a) Was the decision below that of a "court" within the meaning of Section 237 of the Judicial Code?***

This question has been directly passed upon by this Court in *McKnight v. James*, 155 U. S. 685. In that case, the Petitioner sought a writ of habeas corpus before a judge of one of the courts of Ohio, alleging that he was held under a void sentence for perjury, imposed by another Ohio Court. The writ was granted and the return of the Sheriff to whom it was directed, showed that he held the Petitioner under a conviction and sentence that had been affirmed by the Supreme Court of Ohio. The Petitioner replied that after pleading not guilty to the charge of perjury, he was brought into court indigent and without counsel, that the court tried him without counsel in violation of his constitutional rights under the Fourteenth Amendment of the Constitution of the United States, and that the

sentence was also void in that he was required to work at hard labor, although this was not part of the sentence. The case was heard at chambers and the prisoner was remanded to custody. A petition for a writ of error to review the order was dismissed by this Court, which held that, since a writ of error would only lie to the highest court of the State, it would not lie to review an order of a judge at chambers. The petitioner argued in support of his petition for the writ, that the order of the judge at chambers could not be reviewed by the Supreme Court of Ohio, and that, therefore, the order of such judge was the order of the highest court of the State in which a decision could be had. This Court, however, pointed out that an order of the Circuit Court of Ohio, as distinguished from the order of the judge thereof, would have been reviewable by the Supreme Court of the State, and that the petitioner should have had the order of the judge made an order of court.

To the same effect is *Clarke v. McDade*, 165 U. S. 168, in which the petitioner was adjudged in contempt by a State court after his failure to obey an order directing him to file inventories in an insolvency proceeding. He sought numerous writs of habeas corpus from State judges, alleging confinement in violation of the United States Constitution. Nowhere in the proceedings filed in support of his petition for a writ of error did there appear a judgment of a court, although orders of State judges dismissing the writs and remanding the prisoner were shown. Writs of error from these orders were dismissed, and this Court said at page 172:

> "The fatal objection appears in each case that the so-called court orders made upon the returns to the several writs of habeas corpus, which were granted by a judge and returnable before him, do not constitute that final judgment or decree in a suit in the high-

> est court of a state in which a decision in the suit could be had which may be reviewed on writ of error from this court under U. S. Rev. Stat. par. 709. If these various orders did constitute such a final judgment, it does not appear in the record that any question arose in such a manner as would give this court jurisdiction to review the same under the above-named section."

Similar decisions have been rendered with respect to the right to review decisions of United States Circuit Judges in habeas corpus proceedings. *Carper v. Fitzgerald*, 121 U. S. 87; *Lambert v. Barrett*, 157 U. S. 697. Cf. *Craig v. Hecht*, 263 U. S. 255, in which it was held that judges of Circuit Courts of Appeal, may not issue writs of habeas corpus, but may sit as district judges and if so, their orders as such district judges are reviewable by the Circuit Court of Appeals.

Unless these cases are distinguishable from the case at bar by reason of Maryland practice in proceedings involving writs of habeas corpus, it would appear that the present order cannot be reviewed by this Court, without specifically overruling the *McKnight* and *McDade* cases.

It will be remembered that in the *McKnight* case, this Court pointed out that had the order remanding the prisoner been entered by one of the Ohio Courts, as distinguished from a judge at chambers, such order would have been reviewable by the highest court of Ohio. This, however, is not true in Maryland. Section 1 of Article 42 of the Annotated Code of Maryland (1939 Ed.) provides as follows:

> "The court of appeals and the chief judge thereof shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters relating thereto throughout the whole State. The circuit courts for the respective counties of this State, and

the several judges thereof, out of court, the superior court of Baltimore City, the court of common pleas of said city, the circuit court and circuit court No. 2 of Baltimore City, and the Baltimore City court, and the judges of said several courts, out of court, and the judge of the court of appeals from the city of Baltimore, shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters pertaining thereto."

It is not from this Section alone, however, that the power of the judges of this State to issue writs of habeas corpus is derived. Earlier provisions of the above Section had sought to restrict the power of such judges in habeas corpus cases to the issuance of writs to keepers of prisons located within the limits of the circuits of such judges. Such a restriction, however, was held invalid in *Glenn v. State*, 54 Md. 572, in which the Maryland Court of Appeals discussed the early history in England of the issuance of a writ of habeas corpus by judges in chambers, and came to the conclusion that a judge in Maryland, by reason of constitutional provisions making him a conservator of the peace, may issue, at chambers, the writ to run throughout the State, and that any statute restricting such jurisdiction is invalid under the State Constitution. See also *Deckard v. State*, 38 Md. 186.

The Court of Appeals of Maryland, however, has no right to entertain original petitions for writs of habeas corpus, because the Constitution of the State establishes such court as an appellate body only, and, therefore, that portion of Section 1 of Article 42, above quoted, attempting to grant jurisdiction to the Court of Appeals to entertain original petitions of such writ is invalid. *Sevinskey v. Wagus*, 76 Md. 335. Individual judges of such Court, however, by virtue of the Constitution of the State making

them conservators of the peace, may issue the writ. *Ex parte Maulsby*, 13 Md. 625; *ex parte O'Neill*, 8 Md. 227.

It will be seen, therefore, from the decisions cited above that all judges of all courts of general jurisdiction in Maryland may issue writs of habeas corpus, and that all such courts in Maryland, with the exception of the Court of Appeals may also issue such writs. However, regardless of whether such writs are issued by the judges or by the courts, there is no right of review by the Court of Appeals of Maryland except in certain instances specifically provided for by statute, which are inapplicable here. *Jones v. Doe*, — Md. —, 16 A. 2d 901; *Rigor v. State*, 101 Md. 465; *Annapolis v. Howard*, 80 Md. 244; *Coston v. Coston*, 25 Md. 500; *in re Coston*, 23 Md. 271; *Bell v. State*, 4 Gill (Md.) 301.

In the case at bar, Chief Judge Bond was acting as one of the judges of the State, having power to issue the writ. The proceeding was conducted in the same manner as any other proceeding for a writ of habeas corpus filed in this State, and the order as entered, in its effect, was the same as any other order entered in such proceeding with the exception that Judge Bond signed it as judge, rather than as a court. In its effect on the prisoner, however, it was exactly the same as if it had been entered by a court of the State, since the prisoner had no right to a review of such order by the Court of Appeals of Maryland. In this respect, the case differs from *McKnight v. James, supra* for it appears that there, had the petitioner sought the writ before a court of Ohio, the case could have been reviewed by the highest court of that State.

In view of the foregoing, the Respondent feels that in practical effect, the order of Chief Judge Bond was that of a court, just as much as if such proceeding had been filed in one of the established courts of this State.

***(b) Has the petitioner either by appeal or by application to other judges or any other court exhausted his state remedies?***

It has already been shown that under the laws of the State of Maryland the petitioner has no right of appeal either from the action of a judge or of a court in habeas corpus proceedings. It is also quite clear that under the State law a person imprisoned may make continued applications for the writ of habeas corpus so long as he is able to find a State judge or court to whom the application for the writ may be made. *Jones v. Doe, supra, Annapolis v. Howard, supra, Coston v. Coston, supra,* at page 506, *In re Coston, supra,* at page 272, *Bell v. State, supra,* at page 304, *Ex parte Berman,* 14 Fed. Supp. 716.

A recent Maryland statute, Chapter 484 of the Acts of 1941, repeals and reenacts, with amendments, Section 3 of Article 42 of the Annotated Code of Maryland, 1939 Edition, relating to habeas corpus proceedings. The above section as amended provides as follows:

> "3. Any person committed, detained, confined or restrained from his lawful liberty within this State for any alleged offense or under any color or pretense whatsoever, or any person in his or her behalf, may complain to the Court or judge having jurisdiction and power to grant the writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement or restraint may be inquired into; and the said respective courts or judges to whom such complaint is so made shall, unless it appears from the complaint itself or the documents annexed, that the petitioner would not be entitled to any relief, forthwith grant the writ of habeas corpus, directed to the office or other person in whose custody or keeping the party so detained shall be, returnable immediately before the said court or judge granting the same."

Chief Judge Bond in his opinion in the case at bar mentions this statute in the following terms (R. 27):

> "There is now no specific statutory denial of a right to repeated writs, and no specific allowance of it. The statute, (section 3), refers only to a single instance of complaint and appplication. It seems to me, however, that the amendments made could not fairly be said to show a legislative purpose to depart so far from the former practice as to deny all power to issue a second writ. At the same time I cannot believe the Legislature could fairly be considered to have intended leaving the frequent applicant mentioned at liberty to continue obtaining writs indefinitely merely by omitting from his applications any showing that he is not entitled. My conclusion is that a judge would be acting in accordance with the purpose of the statute if he should accept the decision on a first writ as a sufficient adjudication on the complaint and refuse to issue a further one, or, having issued it, should remand the applicant—unless some extraordinary cause is shown against that action. This would require the exercise of some judgment on the second application, and because of that fact an order that cause be shown seems appropriate."

Apparently under this statute as construed by Chief Judge Bond, the order of a judge or court in a prior habeas corpus proceeding is not conclusive on the question of whether upon a second application, the writ should be granted or denied. It seems that the statute should be construed to require a judge hearing a subsequent application to give more consideration to a prior decision than had heretofore been given under Maryland practice. However there is no indication that the statute was intended to make such decision final and conclusive and a bar to a second petition for the writ. Hence there would seem to be no departure from the decisions heretofore cited with

respect to whether an order in a habeas corpus proceeding is final under the State law.

The fact, however, that under State practice an order of a judge or court is not final would not seem to be conclusive as to whether such an order is final within the meaning of Section 237 of the Judicial Code. In *Holmes vs. Jennison*, 14 Pet. 540, in which case the Justices of this court had divergent views and therefore no opinion for the court could be written, four of the judges were of the opinion that a petition for a writ of habeas corpus to obtain release on a criminal charge where detention is alleged to be in violation of the Constitution of the United States, is a suit within the meaning of the jurisdictional statute and that a judgment of a court remanding the prisoner in such proceedings is a final judgment of a State court. See also, in *Tinsley v. Anderson*, 171 U. S. 101, where on appeal from the order of a judge of one of the Texas courts, acting in an habeas corpus proceeding, the Texas Court of Criminal Appeals affirmed such order, it was held that such a proceeding is a suit over which this Court has appellate jurisdiction. To the same effect is the case of *New York, ex rel. Bryant v. Zimmerman*, 278 U. S. 63, wherein it was said:

> "A proceeding in a state court to obtain the release of one held in custody upon a criminal charge where the detention is alleged to be in violation of the Constitution of the United States, is a 'suit' within the meaning of the jurisdictional statute, and an order of the state court of last resort refusing to discharge him is a final judgment in that suit, and subject to review by this Court."

In view of the above decisions interpreting the very Section now before this Court for consideration, the Respondent feels that in so far as Section 237 of the Judicial

Code is concerned, the action of a judge in Maryland in remanding a prisoner to custody in habeas corpus proceedings is final.

## II.

**DOES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE A STATE COURT, ON HABEAS CORPUS, TO RELEASE A PRISONER CONFINED UNDER THE SENTENCE OF A STATE COURT OF GENERAL JURISDICTION AFTER CONVICTION OF A CRIME LESS THAN CAPITAL, SOLELY BECAUSE THE PRISONER WAS INDIGENT AND UNABLE TO PROCURE COUNSEL, WHERE THE STATE COURT, THOUGH REQUESTED, DECLINED TO APPOINT COUNSEL FOR HIM?**

***(a) Does the Fourteenth Amendment to the Constitution of the United States require the appointment of counsel for indigent prisoners by State courts where such prisoners are charged with crimes less than capital?***

It is the contention of the Respondent in the present case that the appointment of counsel by a State court, where the prisoner is indigent and unable to procure counsel, is a necessary element of due process of law to the extent that a fair and just hearing would be thwarted by the failure to appoint counsel, *and to that extent only.* This is the view taken by Chief Judge Bond, as shown by his opinion in the case at bar. (R. 26-31). It was also the opinion of Judge Chesnut of the District Court of the United States for the District of Maryland, in *Gall v. Brady*, 39 Fed. Sup. 504, and *Carey v. Brady*, 39 Fed. Sup. 515. The decision of Judge Chesnut was affirmed on appeal by a divided court in 125 Fed. 2nd 253, hereinafter referred to, and a petition for a writ of certiorari is now before this Court for consideration.

There is no decision of this Court actually holding that such an appointment must be made, even in a capital case where the trial is otherwise fair. There is a statement to this effect in *Avery v. Ala.*, 308 U. S. 444, but the cases

(*Powell v. Ala.*, 287 U. S. 45; *Brown v. Miss.*, 297 U. S. 278) cited in support of the statement, do not sustain the proposition. A decision of this particular question with relation to capital cases is, however, unnecessary to the case at bar, since the Petitioner was convicted of a non-capital offense, and the point is mentioned only to show that there are no decisions of this Court actually deciding the proposition contended for by the Petitioner.

Until the case of *Powell v. Ala., supra*, it seems never to have been considered that the Fourteenth Amendment requires a State Court to appoint counsel for an indigent prisoner in criminal cases, and the then Circuit Judge, William Howard Taft, of the Southern District of Ohio, early said in *In re McKnight*, 52 Fed. 799, a case wherein a writ of habeas corpus was sought before him, based upon the failure of a State court to appoint counsel,

> "The right to have the assistance of counsel is not alleged to have been infringed. The averment is that the trial court failed or refused to assign counsel at the expense of the State, which is a very different thing. Failure to furnish counsel to a defendant is not a want of due process of law. If a State authority accords such a right to an indigent defendant, a denial of it is error only, which does not affect the jurisdiction of the court or render its sentence void."

The Court, itself, in the *Powell* case specifically limits the scope of its ruling by saying at page 71:

> "Whether this would be so in other criminal prosecutions or under other circumstances, we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign coun-

> sel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time, or under such circumstances as preclude the giving of effective aid in the preparation for the trial of the case. * * * In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed when necessary is a logical corollary from the constitutional right to be heard by counsel."

The above statement in and of itself should be a sufficient refutation of the claim that the case decided that the Fourteenth Amendment in all cases requires an appointment of counsel for indigent prisoners. Further comments by this Court show that the *Powell* case did not decide so broad a proposition.

In *Palko v. Conn.*, 302 U. S. 319, Mr. Justice Cardozo said, at page 328:

> "For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth though not in form, they were refused the aid of counsel. * * * The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a Federal Court. Their decision turned upon the fact that in the particular situation laid before us in the evidence, the benefit of counsel was essential to the substance of a hearing."

So also, Mr. Justice Roberts, in his dissenting opinion in *Snyder v. Mass.*, 291 U. S. 97, concurred in by Justices Brandeis, Sutherland and Butler, said at page 128:

> "And this Court has recently decided that in the trial of a *capital* offense, due process includes the right of the accused to be represented by counsel." (Italics supplied.)

In *Boyd v. O'Grady*, 121 Fed. 2d 146, the Court states in broad terms:

> "The procedural guarantee of the Sixth Amendment to the Federal Constitution is protected against State invasion through the Fourteenth Amendment."

But, in view of the comments of this Court, above quoted, this dictum cannot be sustained. This question is fully discussed by Judge Chesnut in *Gall v. Brady, supra*, and *Carey v. Brady, supra*, in which Judge Chesnut held that the absence of counsel is only an element of due process of law, and does not give grounds for reversal in and of itself where the trial was otherwise fairly conducted. This case was appealed to the United States Circuit Court of Appeals for the Fourth Circuit, and was decided on January 12, 1942, by a per curiam opinion, as heretofore stated. No formal opinion was written because

> "one member of the Court is of the opinion that the mere failure of the State Court, upon request, to appoint counsel for an indigent prisoner does not amount to a denial of due process in the absence of other circumstances showing that such appointment is necessary to a fair trial, such as the youth and experience of the prisoner or complicated nature of the charge, the inflamed state of the public mind, acts of oppression on the part of public officers, etc., and that if such failure to appoint counsel should be held to be a denial of due process, it is not such a denial as would destroy the jurisdiction of the Court to proceed with the trial of the case. Another member of the Court is of the view that such failure to appoint counsel is a denial of due process that would justify a reversal of the judgment upon appeal but is not sufficient of itself to destroy the jurisdiction of the Court and authorize the release of the prisoner, after sentence on habeas corpus. The third member of the Court is of the opinion that such a failure is of itself a denial of due process that destroys the jurisdiction of the Court and entitles the prisoner to release on habeas corpus."

This Court has, of course, held that where a Federal Court having general jurisdiction has failed to appoint counsel for a prisoner upon request, his constitutional right to the assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution has been denied, and that such denial constitutes error and the conviction becomes a nullity. *Johnson v. Zerbst*, 304 U. S. 458. This decision, however, is not one under the Fourteenth Amendment and is binding only on the Federal Courts. That there is a distinction between the principle established by *Johnson v. Zerbst, supra*, under the Sixth Amendment and the rule as to counsel, binding on the State Courts under the Fourteenth Amendment, is shown by the recent language of this Court in *Glasser et al., v. U. S.*, — U. S. —, 86 Law Ed. 405. There, it was said:

> "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the assistance of counsel for his defense.' 'This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. *Johnson v. Zerbst*, 304 U. S. 458, 462, 463. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama*, 287 U. S. 45, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and

> unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

The above statement clearly shows that the failure of a State Court to appoint counsel is only an element of due process to be considered as a means of determining whether or not a prisoner in a given instance has had a fair trial.

This Court has, of course, said in certain other State cases, heretofore cited, that the appointment of counsel was essential to a fair hearing, and the Petitioner will presumably argue that in the present case, such appointment is also necessary. This, however, is to fall into the same pitfall mentioned by Mr. Justice Cardozo in *Snyder v. Mass., supra*, when he said, at page 114:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment, a Court founds a rule which is general in form though it has been wrought under the pressure of particular situations. Furthermore, another situation is placed under the rule because it is fitted to the words though related faintly if at all to the reasons that brought the rule into existence."

Here, as in that case, the Petitioner seeks, by the application of a mechanical formula to bring himself within a rule laid down by this Court under totally different circumstances and now claims a reversal of the judgment of the Trial Court because no counsel was appointed for him. The case of *Wilson v. Lanagan, Warden*, 99 Fed. 2d 544, cert. den. 306 U. S. 634, holds to the contrary. In that case, on a charge of smuggling weapons into a Massa-

chusetts jail to aid a prisoner in escaping, the prisoner before trial asked that counsel be appointed for him, but was informed by the Trial Judge that while he could not assign counsel, except in capital cases, the Sheriff would notify any counsel whom he wished to defend him, and would also notify any witnesses that he desired to be summoned. After conviction, the prisoner applied to the Federal District Court of Massachusetts for a writ of habeas corpus on the ground that he had been deprived of a fair trial under the due process clause of the Fourteenth Amendment. The District Court dismissed the writ. Its action was affirmed by the Circuit Court of Appeals and on February 6, 1939, nearly nine months after the decision in *Johnson v. Zerbst, supra,* this Court denied certiorari. *Powell v. Ala., supra,* was distinguished in the opinion of the District Judge, 19 Fed. Sup. 870, 873.

If the case of *Wilson v. Lanagan, supra,* be not treated as binding, the point here involved must be approached as an open question. It is quite clear that "if recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process" (*Powell v. Ala., supra,* page 60), for even the right to be heard by counsel in felony cases was not permitted in England until 1836. It is also quite clear that the provisions contained in the Sixth Amendment of the Federal Constitution, cited in *Powell v. Ala.,* were adopted to do away with this common law rule in the Federal Courts. But even the failure of a Federal Court to appoint counsel for an indigent prisoner was not considered until the decision in *Johnson v. Zerbst, supra,* to have the effect of nullifying the Court's jurisdiction to hear and determine the issue. (See opin-

ion of Judge Chesnut in *Gall v. Brady, supra.*) Since the decision in that case, the rule has been established for such Courts. It is quite clear, however, that the Sixth Amendment has no application to the State Courts, and that if there be such a requirement as to the States, it is only because it is an element of an ordered concept of the administration of justice. *Powell v. Ala., supra,* pages 67 and 68. But, is the appointment of counsel for an indigent prisoner such an element? Certainly, it has not been so considered in Maryland. Section 7 of Article 26 of the Annotated Code of Maryland, provides as follows:

> "The circuit courts for the several counties and the criminal court of Baltimore may appoint assistant counsel for the State, to aid in the trial of criminal or other State cases in said courts, whenever in the judgment of the court in which any such case is pending public interest requires it; and the said courts may likewise appoint counsel to defend any person in the trial of any criminal case in said courts whenever in the judgment of the court in which any such case is pending a just regard for the rights of the accused requires it."

This Section was originally adopted by Chapter 19 of the Acts of 1856, and was amended by Chapter 46 of the Acts of 1886. The Act of 1856 contained no statutory provision for the appointment of counsel for indigent prisoners, and it is only from the amendment of 1886 that the Maryland Courts' statutory authority to make such appointment is derived. It clearly shows that the policy of the State of Maryland has been to leave to the discretion of its trial courts the question of whether counsel in any type of criminal case, capital or otherwise, should be appointed. The Petitioner would have this Court free a prisoner convicted by the Courts of the State of Maryland

according to procedure established in this State at least since 1886, and with no charge that he was denied notice, an opportunity to be heard or a fair trial, but merely because the trial court, though requested, did not appoint counsel for him. Does the Fourteenth Amendment compel such a result?

A long line of decisions of this Court has held that the Fourteenth Amendment does not compel the adoption by the States of any particular form of criminal procedure. The State may abolish presentment or indictment by the Grand Jury as a pre-requisite to the prosecution of a criminal offense. *Hurtado v. California*, 110 U. S. 516, *Snyder v. Mass., supra.* It does not require that a State shall provide for an appellate review in criminal cases. *Reetz v. Mich.*, 188 U. S. 505, *McKane v. Durston*, 153 U. S. 684. The right to be confronted by witnesses contained in the Sixth Amendment is not guaranteed as against action by the State by the due process clause of the Fourteenth Amendment. *West v. Louisiana*, 194 U. S. 258. Trial by jury guaranteed by the Sixth Amendment is not protected from State action by the Privileges and Immunities clause or the due process clause of the Fourteenth Amendment, *Maxwell v. Dow*, 176 U. S. 581. The exemption from compulsory self-incrimination guaranteed by the Fifth Amendment is not protected by either the due process of laws or the Privileges and Immunities clause of the Fourteenth Amendment from abridgement by the State, *Twining v. New Jersey*, 211 U. S. 78. A State statute permitting appeals in criminal cases to be taken by the State with the consent of the trial judge is not an infringement of the due process provisions of the Fourteenth Amendment, *Palko v. Conn., supra.* Mr. Justice Cardozo, in the *Palko* case, *supra*, has enumerated the various instances in which the States have been permitted to do away with established

forms of procedure in criminal cases (on this point see also, *Frank v. Mangum*, 237 U. S. 309), together with those instances in which the Fourteenth Amendment has been held to be a prohibition, and he states, at page 325:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' * * * Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."

Has the "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" been violated in the present case?

As has been heretofore noted, the Petitioner has stated the question here in controversy to be whether the Fourteenth Amendment requires the appointment of counsel for indigent prisoners charged in the State Court with crimes less than capital. The Petitioner will quite logically argue that the need for counsel is no less where a prisoner faces imprisonment than where he faces death, and this, of course, is logically true. However, the Petitioner will hardly contend that in every instance in which life, liberty or property protected by the Fourteenth Amendment is involved, counsel must be appointed. He certainly will not contend that the Fourteenth Amendment requires a magis-

trate hearing traffic violations to appoint counsel for a person charged with exceeding the speed limit merely because such a person is a pauper and requests such appointment even though a conviction will subject that person to imprisonment. Nor will he contend, in a condemnation case, where the owner of the property is shown to be unable to employ counsel, that counsel should be appointed by the State. To carry the logic of the Petitioner's argument to its absurdity, will it be contended that, in a civil case in replevin, property rights in the article replevied being involved, the Court must appoint counsel for an indigent defendant? Will it be contended that even where a person is given a preliminary hearing before a committing magistrate or a United States Commissioner, such magistrate or commissioner must appoint counsel if the prisoner is indigent and requests it? And yet, the right to be heard by counsel as distinguished from the right to the appointment of counsel is guaranteed at every stage of the proceedings, even as to preliminary hearings. See annotation in 84 Law Ed. pages 389-392.

The logic of the Petitioner's argument certainly compels the appointment of counsel at such preliminary hearings since he makes no distinction between the right to such appointment and the right to be heard by counsel, and this logic has been applied by the United States Court of Appeals for the District of Columbia in the case of *Wood v. U. S.*, decided March 9, 1942. Such a ruling effective as against the States, would be extremely difficult to administer in view of the large number of cases either originating before Magistrates and Justices of the Peace by way of preliminary hearing, or actually triable by them.

These instances are, therefore, cited to show that even the logic of the Petitioner's argument requires a line to be drawn somewhere in this type of case. It may be con-

tended that the right to the appointment of counsel is limited to capital cases and felonies, but this line would not be practical in Maryland, and it may well be, in other States, for "the distinction made in some jurisdictions that crimes punishable by death or confinement in the penitentiary are felonies, and others misdemeanors, has never existed in this State, but here, only those are felonies which were such at common law or have been declared so by statute." *Dutton v. State*, 123 Md. 373. For instance, the larceny of dogs or cats in this State is a felony yet a conviction for it is subject to confinement in jail for not mor than three months, Section 393 of Article 27 of the Annotated Code of Maryland (1939 Ed.),[1] while a violation of certain of the motor vehicle laws of Maryland providing a fine of $5,000 and imprisonment for five years is merely a misdemeanor, triable before a magistrate under Section 204 of Article 56 of the Annotated Code of Maryland (1939 Ed.), as amended by Chapter 13 of the Acts of 1941.[2] *Dougherty v. Superintendent, etc.*, 144 Md. 204. These instances are only cited to show the anomalies that may result from an application of the mechanical rule advocated by the Petitioner.

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[1] Every person convicted of feloniously taking and carrying away any dog, bitch, or cat, or as accessory thereto before or after the fact shall be deemed guilty of the crime of larceny, and shall restore the dog, bitch, or cat, to the owner thereof, or shall pay to him the value thereof, and shall be sentenced to confinement in jail for not more than three months.

[2] Any person who shall knowingly make any false statement, either in his application for the ownership certificate herein provided for or in any assignment thereof, or who, with intent to procure or pass title to a motor vehicle, which he knows or has reason to believe has been stolen, shall receive or transfer possession of the same from or to another, or who shall operate or be an occupant of any motor vehicle he knows or has reason to believe has been stolen, and any person who shall intentionally make any false statement or misrepresentation either orally or in writing to said Commissioner of Motor Vehicles, or to any of his deputies or employees, or to any other person whatsoever for the purpose of securing a certificate of title or a transfer or assignment of such certificate of title to himself or to some other person, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000.00) or by imprisonment for not more than five (5) years, or by both fine and imprisonment, in the discretion of the court.

It is to be noted that there is no statute of Maryland here involved that has provided that the State Court shall not appoint counsel for indigent defendants in cases of this nature. The State Court merely did not appoint counsel in this case, and the Petitioner claims that he should be released because the Constitution has been violated. A proper approach to this question has been stated by Mr. Justice Cardozo in *Snyder v. Mass., supra*, at page 115:

> "What we are subjecting to revision is not the action of a Legislature excluding a defendant from appeal at all times or in all conditions. What is here for revision is the action of the judicial department of a State excluding the defendant in a particular set of circumstances and the justice or injustice of that exclusion must be determined in the light of the whole record."

The Petitioner is compelled to admit that there is nothing in the Fourteenth Amendment specifically stating that the mere omission to appoint counsel nullifies the sentence of a State Court of general jurisdiction, and in this connection, Mr. Justice Cardozo also in *Snyder v. Mass., supra*, said:

> "True indeed it is that constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial. In saying this we put aside cases within the rule of de minimis. If the defendant in a federal court were to be denied the opportunity to be confronted with the 'witnesses against him', the denial of the privilege would not be overlooked as immaterial because the evidence thus procured was persuasive of the defendant's guilt. In the same way, privileges, even though not explicit, may be so obviously fundamental as to bring us to the same result. A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however, convincing the ex parte showing. But here, in the case at hand, the privilege, if it

exists, is not explicitly conferred, nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.'"

The Respondent maintains that the appointment of counsel in this case was not so obviously fundamental as to require this Court to reverse the judgment of the trial court. It has been shown that fundamental justice does not require the appearance of counsel in all cases where life, liberty or property are involved. Nor has the presence of counsel been found to be necessary in every instance to protect the prisoner from doing an act that may place his life or liberty in jeopardy. The Petitioner admits, as he must admit, under the rule in *Johnson v. Zerbst, supra*, that a prisoner may knowingly and understandingly plead guilty to an indictment without the benefit of the advice of counsel, and yet, how can he as a layman know whether the indictment contains technical defects that may invalidate it, and give him his freedom?

It would seem that the rule here should be that the appointment of counsel is a necessary element of due process only to the extent that a fair and just hearing would be thwarted by the failure to appoint counsel and to that ex-

tent only, just as it was held in *Snyder v. Mass., supra,* that the presence of the accused at a trial is a necessary element of due process only to the extent that a fair and just hearing would be thwarted by his absence and to that extent only. Cf. *Lisenba v. Calif.*, — U. S. —, 86 L. Ed. 179; *Hysler v. Fla.*, — U. S. —, 86 L. Ed. 585. 39 Harvard Law Review 431.

***(b) Is the judgment of a State court convicting a prisoner of a crime less than capital void where the prisoner is indigent and unable to procure counsel, and where the State court, though requested, declined to appoint counsel for him?***

Even though it be held that the trial court erred in declining to appoint counsel for the Petitioner in this case, it does not necessarily follow that the sentence imposed was void so as to entitle the Petitioner to attack the judgment collaterally through the writ of habeas corpus. As pointed out in the opinion of Chief Judge Bond (R. 28), under the decisions of the Court of Appeals of this State, the contention of the petitioner is not a proper ground for action on a writ of habeas corpus, an appeal being the proper method. This would have been an adequate non-Federal ground for not releasing the prisoner. *Herndon v. Lowry*, 301 U. S. 242, 247. The point, however, raised by the Petitioner was considered by Chief Judge Bond because he was in doubt as to whether the Fourteenth Amendment required him to consider it by making the sentence of the trial court void by reason of its having lost jurisdiction through its refusal to appoint counsel for the Petitioner. The trial court, however, was admittedly a court of general jurisdiction of the State of Maryland, and admittedly had jurisdiction over the prisoner. In view of this situation, therefore, the trial court had jurisdiction to decide the question raised by the Petitioner, so that it can hardly be said that its judgment in deciding the question

by refusing to appoint counsel was void for want of jurisdiction. It is true that this Court held in *Johnson v. Zerbst, supra*, that a writ of habeas corpus would lie in a Federal Court where a Federal Court failed to appoint counsel for indigent prisoners. This decision is based upon the provisions of the Federal statutes relating to habeas corpus and authorizing the issuance of the writ where a prisoner is confined in violation of the Constitution of the United States. These statutes, however, have not always been applied where a prisoner is confined by virtue of a judgment of a State court, even though the prisoner claims his confinement to be in violation of the Federal Constitution. For instance, it has been held by this Court that a judgment of a State court is not void even though a prisoner claims that he is confined after a trial in a State court in which persons of his race were arbitrarily excluded, solely because of their race, from the panel of jurors, and because the State court denied him the right to establish that fact by competent proof. *Andrews v. Swartz*, 156 U. S. 272. See also *In re Wood*, 140 U. S. 278; *In re Jugiro*, 140 U. S. 291. It has been held, of course, that where murderers are rushed to conviction through counsel, jury and judge being swept to such an end by an irresistable wave of public passion, so that no trial in the true sense was afforded them, such judgment of conviction is void for want of due process. *Moore v. Dempsey*, 261 U. S. 86. But that is not the situation here presented. It would be an anomolous situation to hold the trial of the Petitioner in the case at bar void for want of jurisdiction because of the refusal to appoint counsel, when a judgment entered upon the verdict of a jury chosen through discrimination against race or color is immune from collateral attack.

*General Importance of Particular Case.*

If the principle contended for that a criminal trial in a state court is *without jurisdiction* by reason of the non-appointment of counsel for the defendant, the consequences will be great and far reaching and will amount in effect to a general gaol delivery of state prisoners.

The particular case is not an isolated one. The Maryland law and practice authorizes the judge to appoint counsel for indigent defendants wherever that is required by a general regard for the rights of the accused. The Maryland practice generally is shown in the case of *Gall v. Brady, supra.* It has long been the invariable practice to appoint counsel in capital cases, and it is very generally the practice in Baltimore City and many of the separate Counties in Maryland, to appoint counsel where the seriousness of the crime charged or the other circumstances indicate that it is necessary to do so to have the substance of a fair trial. But in the last 50 years there have been thousands of cases tried in Maryland criminal courts where indigent defendants were not represented by counsel and there are probably hundreds of prisoners now in Maryland penal institutions as a result of criminal trials without counsel. In this respect Maryland is not unique and the same situation probably exists in most if not all of the other States. This consideration is not imaginary. If the principle contended for is established we may confidently anticipate a perfect flood of applications to the federal and state courts for the release of prisoners on habeas corpus.

With respect to what constitutes due process, in relation to the appointment of counsel for indigent defendants, the distinction is not to be sharply drawn between capital and non-capital cases. We have shown that the rule contended for by the Petitioner has only been adverted to in capital

cases, but even in those cases there were other circumstances present. Where the substance of a fair trial has been denied it is immaterial whether the criminal charge is great or trivial. Due process means a fair trial free from oppressive circumstances such as mob influence, great public indignation, lack of independence of the trial judge or unfair and oppressive conduct of prosecuting officers. Given the existence of such conditions, it is correct to say that the trial is a nullity and that the court lacked real judicial jurisdiction. But where the trial is free and fair and the rights of the accused are recognized and respected and the conviction is the result of evidence adduced by the government without fraud or pressure, it is quite incorrect to say that the court was without jurisdiction merely because the accused did not have counsel appointed by the court at public expense. There is no authority for such a proposition at common law in the state courts or in the federal courts in reviewing state convictions.

The only Supreme Court cases reviewing state convictions and releasing the prisoners are *Powell v. Alabama, supra*, *Boyd v. O'Grady, supra*, and *Moore v. Dempsey, supra*. None is authority for the principle here contended for. All depended on special facts and circumstances which showed the accused did not have the substance of a fair trial. That a mere non-appointment of counsel by itself was not the determining factor in *Powell v. Alabama* appears from the fact that counsel were indeed there appointed. Nor does *Johnson v. Zerbst*, a federal case, establish the principle contended for. While there is some general language in the opinion to the effect that the failure to appoint counsel deprives the court of jurisdiction, it will be noted from the case as a whole that the prisoners were denied fair opportunity to obtain counsel especially with respect to their desired appeal. The case, therefore, stands on its own facts.

Probably the best recent review of the subject matter, even for federal criminal cases, is the opinion of Judge Sibley of the Fifth Circuit, in *Sanford v. Robbins*, 115 F. 2nd 435, cert. denied 312 U. S. 697.

The true principle to be emphasized is—

> "that appointment of counsel is a necessary element of due process only in those cases where such appointment appears *from the circumstances of the case* to be necessary to a fair and just hearing, and a denial of due process cannot be predicated upon nothing more than the failure of the court to make such appointment."

The meaning of due process under the 14th Amendment (irrespective of the 6th Amendment) is that the hearing must be a real one, not a sham or a pretense. It is the *substance* of a fair trial which is required for due process.

Where the trial is otherwise free and fair the non-appointment of counsel for an indigent defendant does not constitute lack of due process. Where the defendant is without counsel the common law required the judge to represent the accused to the extent of seeing that he gets his legal rights and is not convicted unlawfully, and the judge may assist in questioning the witnesses. Where the accused has no counsel this is still the common practice. *Sanford v. Robbins, supra.*

A habeas corpus court cannot grant a new trial which is the just remedy for errors and it ought not lightly to release those who have been found guilty.

To hold that the appointment of counsel is essential to due process in every case would be for the federal courts to substitute their view of what is desirable in the trial of criminal cases in most if not all the states in the Union and to force the states to revise their trial machinery to

meet a change in the concept of due process out of harmony with their practice and the decisions of other courts. See *Snyder v. Massachusetts, supra,* and the more recent case of *Lisenba v. California, supra.*

Release upon habeas corpus amounts to more than the exercise of appellate jurisdiction by federal courts or the state tribunals. It amounts to nullification of their proceedings by the federal courts on the theory that the proceedings have been so unfair as to amount to a denial of due process, and should be exercised only in extreme cases.

## CONCLUSION.

For these reasons, therefore, the Respondent respectfully maintains that the Order of the Honorable Carroll T. Bond should be affirmed.

Respectfully submitted,

WILLIAM C. WALSH,
Attorney General,

ROBERT E. CLAPP, JR.,
Assistant Attorney General,

J. BERNARD WELLS,
State's Attorney for Baltimore City,

MORTON E. ROME,
Assistant State's Attorney for Baltimore City,

Attorneys for Respondent.

op. 4, 5, 6, dissent

# SUPREME COURT OF THE UNITED STATES.

No. 887.—October Term, 1941.

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|---|---|
| Smith Betts, Petitioner, *vs.* Patrick J. Brady, Warden of the Penitentiary of Maryland. | On Writ of Certiorari to Hon. Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore. |

[June 1, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner was indicted for robbery in the Circuit Court of Carroll County, Maryland. Due to lack of funds, he was unable to employ counsel, and so informed the judge at his arraignment. He requested that counsel be appointed for him. The judge advised him that this would not be done as it was not the practice in Carroll County to appoint counsel for indigent defendants save in prosecutions for murder and rape.

Without waiving his asserted right to counsel the petitioner pleaded not guilty and elected to be tried without a jury. At his request witnesses were summoned in his behalf. He cross-examined the State's witnesses and examined his own. The latter gave testimony tending to establish an alibi. Although afforded the opportunity, he did not take the witness stand. The judge found him guilty and imposed a sentence of eight years.

While serving his sentence, the petitioner filed with a judge of the Circuit Court for Washington County, Maryland, a petition for a writ of *habeas corpus* alleging that he had been deprived of the right to assistance of counsel guaranteed by the Fourteenth Amendment of the federal Constitution. The writ issued, the cause was heard, his contention was rejected, and he was remanded to the custody of the prison warden.

Some months later a petition for a writ of *habeas corpus* was presented to Hon. Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, setting up the same grounds for the prisoner's release as the former petition. The respondent answered, a hearing was afforded, at which an agreed statement of facts was

offered by counsel for the parties, the evidence taken at the petitioner's trial was incorporated in the record, and the cause was argued. Judge Bond granted the writ but, for reasons set forth in an opinion, denied the relief prayed and remanded the petitioner to the respondent's custody.

The petitioner applied to this court for certiorari directed to Judge Bond. The writ was issued on account of the importance of the jurisdictional questions involved and conflicting decisions[1] upon the constitutional question presented. In awarding the writ we requested counsel to discuss the jurisdiction of this court, "particularly (1) whether the decision below is that of a court within the meaning of § 237[2] of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any other state court, have been exhausted."

1. Sec. 237 of the Judicial Code declares this court competent to review, upon certiorari, "any cause wherein a final judgment . . . has been rendered . . . by the highest court" of a state "in which a decision could be had" on a federal question. Was Judge Bond's judgment that of a court within the meaning of the statute? Answer must be made in the light of the applicable law of Maryland.

Art. 4, § 6 of the State Constitution provides: "All Judges shall by virtue of their offices be Conservators of the Peace throughout the State;" . . . Sec. 1 of Art. 42 of the Public General Laws of Maryland (Flack's 1939 Edition) invests the Court of Appeals and the Chief Judge thereof, the Circuit Courts for the respective counties, and the several judges thereof, the Superior Court of Baltimore City, the Court of Common Pleas of that city, the Circuit Court and Circuit Court No. 2 of Baltimore City, the Baltimore City Court, and the judges of the said courts, out of court, and the Judge of the Court of Appeals from the City of Baltimore, with power to grant writs of *habeas corpus* and to exercise jurisdiction in all matters pertaining thereto.

Although it is settled that the grant to the Court of Appeals of the power to issue the writ is unconstitutional and void,[3] and al-

[1] In re McKnight, 52 Fed. 799; Wilson v. Lanagan, 99 F. 2d 544; Boyd v. O'Grady, 121 F. 2d 146; Carey v. Brady, 125 F. 2d 253; Comm. *ex rel.* Schultz v. Smith, 139 Pa. Super. Ct. 357, 11 A. 2d 656; Comm. *ex rel.* McGlinn v. Smith, 344 Pa. 41, 24 A. 2d 1.

[2] 28 U. S. C. § 344(b).

[3] State v. Glenn, 54 Md. 572, 596; Sevinskey v. Wagus, 76 Md. 335.

though the statute does not confer on individual judges of the Court of Appeals the power to issue a writ and proceed thereon, nevertheless, those judges, as conservators of the peace, have the power under the quoted section of the Constitution.[4] In any event, Judge Bond is the Chief Judge of the Court of Appeals and the judge of that court from the City of Baltimore and, as such, is empowered to act.

Sections 2 to 6, inclusive, 9 to 12 inclusive, and 17 of the statute prescribe the procedure governing the issue of the writ, its service, the return, and the hearing. No question is made but that Judge Bond complied with these provisions. It is, therefore, apparent that in all respects he acted in a judicial capacity and that, in his proper person, he was a judicial tribunal having jurisdiction, upon pleadings and proofs, to hear and to adjudicate the issue of the legality of the petitioner's detention. If Judge Bond had been sitting in term time as a member of a court, clothed with power to act as one of the members of that court, his judgment would be that of a court within the scope of § 237. Doubt that his judgment in the present instance is such arises out of our decision in *McKnight* v. *James*, 155 U. S. 685, where we refused to review the denial of a discharge by a judge of an inferior court of Ohio who issued the writ and heard the case at chambers. It appeared that the petitioner had addressed his petition to a judge of the Circuit Court instead of the court itself and that, for this reason, the order of the judge was not reviewable by the Supreme Court of Ohio as it would have been had the writ been addressed to the Circuit Court though heard by a single judge. The petitioner had not exhausted his state remedy since, though he could have obtained a decision by the highest court of the state, he had avoided doing so, and then sought to come to this court directly from the order of the Circuit judge on the theory that that judge's order was the final order of the highest court of the state which could decide his case. In a later decision we referred to this and other cognate cases as deciding that appeals do not lie to this court from orders by judges at chambers,[5] but the fundamental reason for denying our jurisdiction was that the appellant had not exhausted state remedies.

In view of what has been said of the power of Judge Bond as a judicial tribunal to hear and finally decide the cause, and of the

[4] Ex parte O'Neill, 8 Md. 227; Ex parte Maulsby, 13 Md. 625.

[5] Craig v. Hecht, 263 U. S. 255, 276.

judicial quality of his action, we are of opinion that his judgment was that of a court within the intendment of Sec. 237.

2. Did the judgment entered comply with the requirement of Sec. 237 that it must be a final judgment rendered by the highest court in which a decision could be had? Again answer must be made in the light of the applicable law of Maryland. The judgment was final in the sense that an order of a Maryland judge in a *habeas corpus* case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances named in statutes which are here inapplicable.[7] It is true that the order was not final, and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the states, and in the federal courts, a prisoner may apply successively to one judge after another and to one court after another without exhausting his right.[8] We think this circumstance does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the sense that it is not subject to review by any other court of the State, we may, in our discretion, refuse the writ when there is a higher court of the State to which another petition for the relief sought could be addressed,[6] but this is not such a case. To hold that, since successive applications to courts and judges of Maryland may be made as of right, the judgment in any case is not final, would be to deny all recourse to this court in such cases.

Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had of the issue joined on the instant petition we have jurisdiction to review it.

3. Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?

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[6] Bell v. State, 4 Gill, 301; Ex parte O'Neill, 8 Md. 227; In re Coston, 23 Md. 271; Coston v. Coston, 25 Md. 500; State v. Glenn, 54 Md. 572; Annapolis v. Howard, 80 Md. 244; Petition of Otho Jones, 179 Md. 240.

[7] Judge Bond intimates that § 3 of Art. 42, as amended by Laws 1941, c. 484 permits the use of a rule to show cause (cf. Holiday v. Johnston, 313 U. S. 342) or other form of preliminary inquiry to avoid the necessity of the issue of a writ and a hearing where a redundant petition is filed disclosing no new matter. See, Salinger v. Loisel, 265 U. S. 224, 231-232. He determined, however, in this case to issue the writ and afford a hearing.

[8] Tenner v. California, No. 713, Oct. T. 1941.

The Sixth Amendment of the national Constitution applies only to trials in federal courts.[9] The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment[10] although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.[11] Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[12] In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state. Expressions in the opinions of this court lend color to the argu-

[9] United States v. Dawson, 15 How. 467, 487; Twitchell v. Pennsylvania, 7 Wall. 321, 325; Spies v. Illinois, 123 U. S. 131, 166; In re Sawyer, 124 U. S. 200, 219; Brooks v. Missouri, 124 U. S. 394, 397; Eilenbecker v. District Court, 134 U. S. 31, 34, 35; West v. Louisiana, 194 U. S. 258, 263; Howard v. Kentucky, 200 U. S. 164, 172.

[10] Hurtado v. California, 110 U. S. 516; Maxwell v. Dow, 176 U. S. 581; West v. Louisiana, 194 U. S. 258; Twining v. New Jersey, 211 U. S. 78; Frank v. Mangum, 237 U. S. 309; Snyder v. Mass., 291 U. S. 97; Palko v. Conn., 302 U. S. 319.

[11] Compare Twining v. New Jersey, 211 U. S. 78, 98; Powell v. Alabama, 287 U. S. 45; Palko v. Connecticut, 302 U. S. 319, 323 ff.

[12] Compare Lisenba v. California, Nos. 4 & 5 Oct. T. 1941, Slip opinion, p. 13; 86 L. Ed. 179, 189.

ment,[13] but, as the petitioner admits, none of our decisions squarely adjudicates the question now presented.

In *Powell* v. *Alabama*, 287 U. S. 45, ignorant and friendless negro youths, strangers in the community, without friends or means to obtain counsel, were hurried to trial for a capital offense without effective appointment of counsel on whom the burden of preparation and trial would rest, and without adequate opportunity to consult even the counsel casually appointed to represent them. This occurred in a State whose statute law required the appointment of counsel for indigent defendants prosecuted for the offense charged. Thus the trial was conducted in disregard of every principle of fairness and in disregard of that which was declared by the law of the State a requisite of a fair trial. This court held the resulting convictions were without due process of law. It said that, in the light of all the facts, the failure of the trial court to afford the defendants reasonable time and opportunity to secure counsel was a clear denial of due process. The court stated further that "under the circumstances, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment was also a denial of due process", but added: "whether this would be so in other criminal prosecutions or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that, in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law;" . . .

Likewise, in *Avery* v. *Alabama*, 308 U. S. 444, the state law required the appointment of counsel. The claim which we felt required examination, as in the *Powell* case, was that the purported compliance with this requirement amounted to mere lip service. Scrutiny of the record disclosed that counsel had been appointed and the defendant had been afforded adequate opportunity to prepare his defense with the aid of counsel. We, therefore, overruled the contention that due process had been denied.

In *Smith* v. *O'Grady*, 312 U. S. 329, the petition for *habeas corpus* alleged a failure to appoint counsel but averred other facts

[13] Powell v. Alabama, 287 U. S. 45, 73; Grosjean v. American Press Co., 297 U. S. 233, 243, 244; Johnson v. Zerbst, 304 U. S. 458, 462; Avery v. Alabama, 308 U. S. 444, 447.

which, if established, would prove that the trial was a mere sham and pretense, offensive to the concept of due process. There also, state law required the appointment of counsel for one on trial for the offence involved.

Those cases, which are the petitioner's chief reliance, do not rule this. The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness? The answer to the question may be found in the common understanding of those who have lived under the Anglo-American system of law. By the Sixth Amendment the people ordained that, in all criminal prosecutions, the accused should "enjoy the right . . . to have the assistance of counsel for his defence." We have construed the provision to require appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, and where the right has not been intentionally and competently waived.[14] Though, as we have noted, the amendment lays down no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment. Relevant data on the subject are afforded by constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the states to the present date. These constitute the most authoritative sources for ascertaining the considered judgment of the citizens of the states upon the question.

The Constitutions of the thirteen original states, as they were at the time of federal union, exhibit great diversity in respect of the right to have counsel in criminal cases. Rhode Island had no constitutional provision on the subject until 1843, North Carolina and South Carolina had none until 1868. Virginia has never had any. Maryland, in 1776, and New York, in 1777, adopted provisions to the effect that a defendant accused of crime should be "allowed" counsel. A constitutional mandate that the accused should have a right to be heard by himself and by his counsel

[14] Johnson v. Zerbst, 304 U. S. 458.

was adopted by Pennsylvania in 1776, New Hampshire in 1774, by Delaware in 1782, and by Connecticut in 1818. In 1790 Massachusetts ordained that the defendant should have the right to be heard by himself or his counsel at his election. In 1798 Georgia provided that the accused might be heard by himself or counsel or both. In 1776 New Jersey guaranteed the accused the same privileges of witnesses and counsel as their prosecutors "are or shall be entitled to."

The substance of these provisions of colonial and early state constitutions is explained by the contemporary common law. Originally in England a prisoner was not permitted to be heard by counsel upon the general issue of not guilty on any indictment for treason or felony.[15] The practice of English judges, however, was to permit counsel to advise with a defendant as to the conduct of his case and to represent him in collateral matters and as respects questions of law arising upon the trial.[16] In 1695 the rule was relaxed by statute[17] to the extent of permitting one accused of treason the privilege of being heard by counsel. The rule forbidding the participation of counsel stood, however, as to indictments for felony, until 1836, when a statute accorded the right to defend by counsel against summary convictions and charges of felony.[18] In misdemeanor cases and, after 1695, in prosecutions for treason, the rule was that the defense must be conducted either by the defendant in person or by counsel, but that both might not participate in the trial.[19]

In the light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be "allowed" counsel or should have a right "to be heard by himself and his counsel", or that he might be heard by "either or both", at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the state to provide counsel for a defendant. At the least, such a construction by state courts and legislators can not be said to lack reasonable basis.

The statutes in force in the thirteen original states at the time of the adoption of the Bill of Rights are also illuminating. It is

[15] Chitty Criminal Law (5th Am. Ed.) Vol. 1, p. 406.

[16] Chitty, *supra*, Vol. I, p. 407; Rex v. Parkins, 1 C. & P. 314.

[17] 7 Will. 3, c. 3, § 1.

[18] 6 & 7 Will. 4, c. 114, §§ I and II.

[19] Rex v. White, 3 Camp. N. P. 97; Reg. v. Boucher, 8 C. & P. 655.

of interest that the matter of appointment of counsel for defendants, if dealt with at all, was dealt with by statute rather than by constitutional provision. The contemporary legislation exhibits great diversity of policy.[20]

The constitutions of all the states, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. Those of nine states[21] may be said to embody a guarantee textually the same as that of the Sixth Amendment or of like import. In the fundamental law of most states, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice.[22]

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[20] Connecticut had no statute although it was the custom of the courts to assign counsel in all criminal cases. Swift, "System of Laws, Connecticut", 1796, Vol. II, p. 392. In Delaware Penn's Laws of 1719, ch. XXII and in Pennsylvania the Act of May 31, 1718, § III (Mitchell and Flanders' Statutes at Large of Penna., 1682-1801, Vol. III, p. 201) provided for appointment only in case of "felonies of death". Georgia has never had any law on the subject. Maryland had no such law at the time of the adoption of the Bill of Rights. An Act of 1777 in Massachusetts gave the right to have counsel appointed in cases of treason or misprision of treason. Laws of the Commonwealth of Massachusetts from Nov. 28, 1780 to Feb. 28, 1807, Ch. LXXI, Vol. II, Appendix, p. 1049. By an Act of Feb. 8, 1791, New Hampshire required appointment in all cases where the punishment was death. Metcalf's Laws of New Hampshire, 1916, Vol. 5, pp. 596, 599. An Act of New Jersey of Mch. 6, 1795, § 2, required appointment in the case of any person tried upon an indictment. Acts of the General Assembly of the Session of 1794, Ch. DXXXII, p. 1012. New York apparently had no statute on the subject. See Act Feb. 20, 1787, Laws of New York, Sessions 1st to 20th (1798), Vol. I, pp. 356-7. An Act of 1777 of North Carolina made no provision for appointment, but accorded defendants the right to have counsel. Laws of North Carolina, 1789, pp. 40, 56. Rhode Island had no statute until 1798 when one was passed in the words of the Sixth Amendment. Laws 1798, p. 80. South Carolina, by Act of August 20, 1731, limited appointment to capital cases. Grimke's So. Car. Pub. Laws, 1682-1790, p. 130. Virginia, by Act of Oct. 1786, enacted with respect to one charged with treason or felony that "the court shall allow him counsel . . . if he desire it.". Hening's Statutes of Virginia, 1785-1788, Vol. 12, p. 243.

[21] *Georgia* (Art. I, Par. V); *Iowa* (Art. I, Sec. 10); *Louisiana* (Art. I, Sec. 9; *Michigan* (Dec. of Rights, Art. II, Sec. 19); *Minnesota* (Art. I, Sec. 6); *New Jersey* (Art. I, Sec. 8); *North Carolina* (Art. I, Sec. 11); *Rhode Island* (Art. I, Sec. 10); *West Virginia* (Art. III, Sec. 14).

[22] Some assert the right of a defendant "to appear and defend in person and by counsel". *Arizona* (Art. II, Sec. 24); *Colorado* (Art. II, Sec. 16); *Illinois* (Art. II, Sec. 9); *Missouri* (Art. II, Sec. 22); *Montana* (Art. III, Sec. 16); *New Mexico* (Art. II, Sec. 14); *South Dakota* (Art. VI, Sec. 7); *Utah* (Art. I, Sec. 12); *Wyoming* (Art. I, Sec. 10). Others phrase the right as that "to be heard by himself and [his] counsel": *Arkansas* (Art. II, Sec. 10); *Delaware* (Art. I, Sec. 7); *Indiana* (Art. I, Sec. 13); *Kentucky* (Bill of Rights, Sec. 11); *Pennsylvania* (Art. I, Sec. 9); *Tennessee* (Art. I, Sec. 9); *Vermont* (Ch. I, Art. 10th); or "by himself and by counsel"; *Connecticut* (Art. I, Sec. 9) or "by himself and counsel": *New Hampshire* (Bill of Rights, 15th); *Oklahoma* (Art. II, Sec. 20); *Oregon* (Art. I, Sec. 11); *Wisconsin*

In three states the guarantee, whether or not in the exact phraseology of the Sixth Amendment, has been held to require appointment in all cases where the defendant is unable to procure counsel.[23] In six the provisions (one of which is like the Sixth Amendment) have been held not to require the appointment of counsel for indigent defendants.[24] In eight, provisions, one of which is the same as that of the Sixth Amendment, have evidently not been viewed as requiring such appointment, since the courts have enforced statutes making appointment discretionary, or obligatory only in prosecutions for capital offenses or felonies.[25]

In twelve states it seems to be understood that the constitutional provision does not require appointment of counsel, since statutes of greater or less antiquity call for such appointment only in

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(Art I, Sec. 7); or "by himself and counsel or either": *Alabama* (Art. I, Sec. 6); "by himself or counsel or [by] both": *Florida* (Dec. of Rights, Sec. 11); *Mississippi* (Art. III, Sec. 26); *South Carolina* (Art. I, Sec. 18); *Texas* (Art. I, Sec. 10). The verbiage sometimes employed is: "to appear and defend in person and with counsel": *California* (Art. I, Sec. 13), *Idaho*, (Art. I, Sec. 13); *North Dakota* (Art. I, Sec. 13) *Ohio* (Art. I, Sec. 10); or "in person or by counsel": *Kansas* (Bill of Rights, Sec. 10); *Nebraska* (Art. I, Sec. 11); *Washington* (Art. I, Sec. 22). *Nevada* (Art. I, Sec. 8) and *New York* (Art. I, Sec. 6) add: "as in civil actions". Some constitutions formulate the right as one "to be heard by himself and his counsel at his election" or "himself and his counsel or either at his election": *Massachusetts* (Part I, Sec. 12), *Maine* (Art. I, Sec. 6). *Maryland* (Dec. of Rights, Art. 21) states the right as that "to be allowed counsel".

[23] Elam v. Johnson, 48 Ga. 348; Delk v. State, 99 Ga. 667, 26 S. E. 752; Fugate v. Comm., 254 Ky. 663, 72 S. W. 2d 47; Carpenter v. Dane, 9 Wis. 274.

[24] Cutts v. State, 54 Fla. 21, 45 So. 491; McDonald v. Comm., 173 Mass. 322, 53 N. E. 874; People v. Dudley, 173 Mich. 389, 138 N. W. 1044; People v. Williams, 225 Mich. 133; People v. Harris, 266 Mich. 317; People v. Crandell, 270 Mich. 124, 258 N. W. 224; Comm. v. Smith, 344 Pa. 41, 24 A. 2d 1; State v. Sweeney, 48 S. D. 248, 203 N. W. 460; State v. Yoes, 67 W. Va. 546, 68 S. E. 181; cf. Pardee v. Salt Lake County, 39 Utah 482, 118 P. 122.

[25] *Alabama:* Code (1940) Tit. 15, Sec. 318; Campbell v. State, 182 Ala. 18, 62 S. 57; Gilchrist v. State, 234 Ala. 73, 173 S. 651; Clark v. State, 239 Ala. 380, 195 S. 260. *Louisiana:* Code Crim. Proc. (Dart, 1932) Tit. XIII, Art. 143; State v. Davis, 171 La. 449, 131 S. 295. *Maryland:* Annotated Code (Flack, 1939); Art. 26, Par. 7, p. 1060; cf. the decision below and Coates v. Maryland, decided by the Court of Appeals of Maryland April 22, 1942. *Mississippi:* Annotated Code (1930) Crim. Proc. Ch. 21, Sec. 1262; Laws 1934 Ch. 303; Reed v. State, 143 Miss. 686, 109 S. 715; Robinson v. State, 178 Miss. 568, 173 S. 451. *Rhode Island:* General Laws 1938, Ch. 625, Sec. 62; Acts & Resolves, 1891, Ch. 921, p. 165; State v. Hudson, 55 R. I. 141, 179 A. 130. *South Carolina:* Code 1932, Vol. 1, § 979; State v. Jones, 172 S. C. 129, 173 S. E. 77. *Texas:* Lopez v. State, 46 Tex. Cr. 473, 80 S. W. 1016; Faggett v. State, 122 Tex. Cr. 399; Thomas v. State, 106 S. W. 2d 289; Austin v. State, 51 S. W. 249. *Vermont:* Public Laws (1933) Ch. 57, Sec. 1424; Ch. 101, Sec. 2327; Ch. 102, Sec. 2370; State v. Gomez, 89 Vt. 490, 96 A. 190.

capital cases or cases of felony or other grave crime,[26] or refer the matter to the discretion of the court.[27] In eighteen states the statutes now require the court to appoint in all cases where defendants are unable to procure counsel.[28] But this has not always been the statutory requirement in some of those states.[29] And it seems to have been assumed by many legislatures that the matter was one for regulation from time to time as deemed neces-

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[26] *Arkansas:* Steel & McCampbell's Compiled Laws of Arkansas Territory, 1835, "Crimes and Misdemeanors", Sec. 37, p. 194; Gantt's Digest of Ark. Stats. 1874, Crim. Proc. Chap. 43, Art. XII, § 1824, p. 410; Pope's Digest (1937), Vol. 1, chap. 43, § 3877, p. 1180. *Delaware:* Penn's Laws, Chap. XXII (1719); Rev. Code (1935) chap. 114, 4305-6. *Kansas:* Gen. Stats. 1868, chap. 82, § 160, p. 845; Gen. Stats. 1935, Chap. 62, § 1304, p. 1449. *Maine:* Act of March 8, 1826, § 6, p. 146; R. S. Apr. 17, 1857, Chap. 134, § 12, p. 713; R. S. 1930, Chap. 146, § 14, p. 1655. *Minnesota:* Act of March 5, 1869, G. L. 1869, Chap. LXXII, § 1; Mason's Minn. Stats. (1927) Vol. 2, ch. 94, § 9957. *Missouri:* Casselberry's Rev. Stats. 1845, pp. 434, 443-4, 458; Rev. Stats. (1939) Crim. Proc. § 4003. *Nebraska:* Geh. Stats. 1873, Ch. 58, § 437, p. 821; Comp. Stat. (1929) Crim. Proc. Art. 18, Sec. 29-1803. *New Hampshire:* R. S. 1843, Tit. XXVII, Ch. 225, p. 457; Pub. Laws (1926), Ch. 368, Laws 1937, c. 22. *Washington:* Territorial Stats. 1881, Ch. LXXXV, § 1063; Rem. Rev. Stats. Vol. 4, Ch. 2, § 2305.

[27] *Arizona:* Code (1939) Art. 9, §§ 44-904, 44-905. *Colorado:* Colo. Stats. Annotated (1935), Vol. 2, Chap. 48, § 502, p. 1148. *Maryland:* Laws 1886, ch. 46, p. 66; Anno. Code (Flack, 1939), Art. 26, par. 7.

[28] *California*, Penal Code, Deering (1937), Pt. 2, Tit. 6, c. 1, § 987; *Idaho*, Code Anno. (1932) § 19-1412; *Illinois*, R. S. 1935, c. 38, ¶ 754; *Iowa*, Code 1939, c. 640, § 13773; *Kansas*, Laws 1941, c. 291; *Michigan*, Statutes Ann. § 28.1253; *Montana*, Rev. Codes Ann. (1935) c. 73, § 11886; *Nevada*, Comp. Laws (1929) Cr. L. & Proc. § 10883; *New Jersey*, N. J. Stat. Ann. § 2:190-3; *New York*, Thompson's Laws (1939) Pt. II, Code of Crim Proc. § 308; *North Dakota*, Comp. Laws (1913) Vol. II, § 8965; *Ohio*, Throckmorton's Code Ann. (1940) § 13439-2; *Oklahoma*, Stats. Ann. Tit. 22, § 1271; *Oregon*, Comp. Laws Ann. Vol. 3, § 26-804; *South Dakota*, Code (1939) § 34.1901; *Tennessee*, Michie's Code (1938), § 11734; *Utah*, R. S. (1938) Code Cr. Proc. § 105-22-12; *Wyoming:* R. S. (1931) §33-501. Connecticut provides official public defenders available to all persons unable to retain counsel. G. S. (Revision of 1930), c. 335, § 6476.

At least as early as 1903 (3 Edw. 7, c. 38) England adopted a Poor Prisoners' Defence Act under which a rule was adopted whereby an accused might defend by counsel assigned by the court. Bowen-Rowlands, Criminal Proceedings, London (1904) pp. 46-47. The existing statute is the Poor Prisoners' Defence Act (1930) 20 & 21, Geo. 5, c. 32. See Archbold's Criminal Pleading, Evidence and Practice, 30th Ed. (1938) p. 167. Under this act a poor defendant is entitled as of right to counsel on a charge of murder but assignment of counsel is discretionary in other cases.

[29] See e. g. earlier and more restricted statutes: *Idaho* Terr. Laws, 2d Sess., 1864, ch. II, p. 246; *Iowa*, Act of January 4, 1839, § 64; Korf *v.* Jasper County, 132 Ia. 682, 108 N. W. 1031; *Michigan*, Laws 1857, Act #109, p. 239; *Montana*, Act, January 12, 1872, Ch. IX, § 196; *Nevada*, Comp. L. 1861-73; Chap. LIII. Changes in the statutes of other states might be cited. Compare Notes 20 and 28.

sary, since laws requiring appointment in all cases have been modified to require it only in the case of certain offenses.[30]

This material demonstrates that, in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

The practice of the courts of Maryland gives point to the principle that the states should not be straight-jacketed in this respect, by a construction of the Fourteenth Amendment. Judge Bond's opinion states, and counsel at the bar confirmed the fact, that in Maryland the usual practice is for the defendant to waive a trial by jury. This the petitioner did in the present case. Such trials, as Judge Bond remarks, are much more informal than jury trials and it is obvious that the judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved.[31]

In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offence. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that

[30] *Louisiana.* Compare Laws, 1855, Act No. 121; State v. Ferris, 16 La. Ann. 424; State v. Bridges, 109 La. 330, 33 S. 589, with La. Code Crim. Proc. (Dart) 1932, Tit. XIII, Art. 143. *Nebraska.* Compare Laws of 1869, p. 163, with Comp. Stats. (1929) § 29-1803. *Washington.* Compare Code of Washington Terr. (1881), ch. LXXXV, § 1063 with Rem. Rev. Stats. Vol. 4, ch. 2, § 2305. And compare Texas Code Crim. Proc. (1856), Pt. III, Arts. 466-7 with Vernon's Stats. (1936), Art. 1917, and Lopez v. State, 46 Tex. Cr. 473, 80 S. W. 1016, and Thomas v. State, 106 S. W. 2d 289.

[31] Judge Bond adds: "Certainly my own experience in criminal trials over which I have presided (over 2000, as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners."

narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused tried without counsel had been handicapped by the lack of representation.[32]

To deduce from the due process clause a rule binding upon the states in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: "Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it." And indeed it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner logic would require the furnishing of counsel in civil cases involving property.

As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

The judgment is affirmed.

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[32] Coates v. State (Court of Appeals of Maryland, decided April 22, 1942, not yet reported).

# SUPREME COURT OF THE UNITED STATES.

No. 837.—October Term, 1941.

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| Smith Betts, Petitioner, *vs.* Patrick J. Brady, Warden of the Penitentiary of Maryland. | On Writ of Certiorari to Hon. Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore. |

[June 1, 1942.]

Mr. Justice Black, dissenting, with whom Mr. Justice Douglas and Mr. Justice Murphy concur.

To hold that the petitioner had a constitutional right to counsel in this case does not require us to say that "no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." This case can be determined by resolution of a narrower question: whether in view of the nature of the offense and the circumstances of his trial and conviction, this petitioner was denied the procedural protection which is his right under the federal constitution. I think he was.

The petitioner, a farm hand, out of a job and on relief, was indicted in a Maryland state court on a charge of robbery. He was too poor to hire a lawyer. He so informed the court and requested that counsel be appointed to defend him. His request was denied. Put to trial without a lawyer, he conducted his own defense, was found guilty, and was sentenced to eight years' imprisonment. The court below found that the petitioner had "at least an ordinary amount of intelligence." It is clear from his examination of witnesses that he was a man of little education.

If this case had come to us from a federal court, it is clear we should have to reverse it, because the sixth amendment makes the right to counsel in criminal cases inviolable by the federal government. I believe that the fourteenth amendment made the sixth applicable to the states.[1] But this view, although often urged in

[1] Discussion of the fourteenth amendment by its sponsors in the Senate and House shows their purpose to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights. The legislative history and subsequent course of the amendment to its final adoption have been discussed in Flack, "The Adoption of the Fourteenth Amend-

dissents, has never been accepted by a majority of this Court and is not accepted today. A statement of the grounds supporting it is, therefore, unnecessary at this time. I believe, however, that under the prevailing view of due process, as reflected in the opinion just announced, a view which gives this Court such vast supervisory powers that I am not prepared to accept it without grave doubts, the judgment below should be reversed.

This Court has just declared that due process of law is denied if a trial is conducted in such manner that it is "shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness and right." On another occasion this Court has recognized that whatever is "implicit in the concept of ordered liberty" and "essential to the substance of a hearing" is within the procedural protection afforded by the constitutional guaranty of due process. *Palko* v. *Connecticut*, 302 U. S. 319, 325, 327.

The right to counsel in a criminal proceeding is "fundamental." *Powell* v. *Alabama*, 287 U. S. 45, 70; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-244. It is guarded from invasion by the sixth amendment, adopted to raise an effective barrier against arbitrary or unjust deprivation of liberty by the federal government. *Johnson* v. *Zerbst*, 304 U. S. 458, 462.

An historical evaluation of the right to a full hearing in criminal cases and the dangers of denying it were set out in the *Powell* case where this Court said: "What . . . does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the person asserting the right . . . . Even the intelligent and educated layman . . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, *supra*, 68-69. Cf. *Johnson* v. *Zerbst*, *supra*, 462-463.

A practice cannot be reconciled with "common and fundamental ideas of fairness and right", which subjects innocent men to in-

ment." Flack cites the Congressional debates, committee reports, and other data on the subject. Whether the amendment accomplished the purpose its sponsors intended has been considered by this Court in the following decisions, among others: O'Neil v. Vermont, 144 U. S. 323, dissent, 337; Maxwell v. Dow, 176 U. S. 581, dissent, 605; Twining v. New Jersey, 211 U. S. 78, 98-99, dissent, 114.

creased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. No one questions that due process requires a hearing before conviction and sentence for the serious crime of robbery. As the Supreme Court of Wisconsin said in 1859, ". . . would it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial of the matters with which he was charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him. . . . Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?" *Carpenter* v. *Dane County*, 9 Wis. 274, 276-277.

*Denial to the poor of the request for counsel* in proceedings based on charges of serious crime has long been regarded as shocking to the "universal sense of justice" throughout this country. In 1854, for example, the Supreme Court of Indiana said: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, shall be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defence of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public." *Webb* v. *Baird*, 6 Ind. 13, 18. And most of the other states have shown their agreement by constitutional provisions, statutes, or established practice judicially approved which assure that no man shall be deprived of counsel merely because of his poverty.[2] Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.

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[2] In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in capital as well as serious non-capital criminal cases (*e. g.*, where the crime charged is a felony, a "penitentiary offense", an offense punishable by imprisonment for several years) be provided with counsel on request. In nine states, there are no clearly controlling statutory or constitutional provisions and no decisive reported cases on the subject. In two states, there are dicta in judicial decisions indicating a probability that the holding of the court below in this case would be followed under similar circumstances. In only two states (including the one in which this case arose) has the practice here upheld by this Court been affirmatively sustained. Appended to this opinion is a list of the several states divided into these four categories.

APPENDIX.

I. States which require that indigent defendants in capital as well as non-capital criminal cases be provided with counsel on request:

A. *By statute.* ARIZONA: Revised Statutes of Arizona Territory, 1901, Penal Code, Pt. II, Title VII, § 858; Arizona Code Ann. 1939, Vol. III, § 44-904. ARKANSAS: Compiled Laws, Arkansas Territory, 1835, Crimes and Misdemeanors, § 37; Pope's Digest, 1937, Vol. I, c. 43, § 3877. CALIFORNIA: California Penal Code of 1872, § 987; Deering's Penal Code, 1937, § 987. IDAHO: Territorial Criminal Practice Act, 1864, § 267; Idaho Code, 1932, §§ 19-1412, 19-1413. ILLINOIS: Rev. Stat. 1874, Criminal Code, § 422; Jones's Ill. Stat. Ann. 1936, § 37.707. *Cf.* Laws, 1933, 430-431. See also, Vise *v.* County of Hamilton, 19 Ill. 78, 79 (1857). IOWA: Territorial Laws, 1839, Courts, § 64; Iowa Code, 1939, § 13773. KANSAS: See compilation published in 1856 as S. Doc. No. 23, 34th Cong., 1st Sess., 520 (C. 129, Art. V, § 4). Laws, 1941, c. 291. LOUISIANA: Act of May 4, 1805, of the Territory of Orleans, § 35; Dart's Louisiana Code of Criminal Procedure, 1932, Title XIII, Art. 143. MINNESOTA: Minnesota General Laws, 1869, c. LXXII, § 1; Mason's Minnesota Statutes, 1927, §§ 9957, 10667. MISSOURI: Digest of Laws of Missouri Territory, 1818, Crimes and Misdemeanours, § 35; Rev. Stat. 1939, § 4003. MONTANA: Montana Territory Criminal Practice Act of 1872, § 196 (Laws of Montana, Codified Stat. 1871-1872, 220); Revised Code, 1935, § 11886. NEBRASKA: General Statutes, 1873, c. 42, § 437; Compiled Stat. 1929, § 29-1803. NEVADA: Act of November 26, 1861 (Compiled Laws, 1861-1873, Vol. I, 477, 493); Compiled Laws, 1929, Vol. 5, § 10883. NEW HAMPSHIRE: Laws, 1907, c. 136; Laws, 1937, c. 22. NEW JERSEY: Act of March 6, 1795, § 2; New Jersey Stat. § 2.190-3. NEW YORK: Code of Criminal Procedure, § 308 (enacted in 1881, still in force). See People *v.* Supervisors of Albany County, 28 How. Pr. 22, 24 (1864). NORTH DAKOTA: Dakota Territory Code of Procedure, 1863, § 249 (Rev. Codes, 1877, Criminal Procedure 875); Compiled Laws, 1913, Vol. II, §§ 9965, 10721. OHIO: Act of February 26, 1816, § 14 (Chase, Statutes of Ohio, 1788-1833, Vol. II, 982); Throckmorton's Ohio Code Ann., 1940, Vol. II, § 13439-2. OKLAHOMA: Oklahoma Territorial Stat., 1890, c. 70, § 10; Stat. Ann. 1941 Supp., Title 22, § 464. OREGON: Act of October 19, 1864 (General Laws, 1845-1864, c. 37, § 381; Laws 1937, c. 406 (Compiled Laws Ann., Vol. III, § 26-804). SOUTH DAKOTA: Dakota Territory Code of Procedure, 1863, § 249 (Rev. Codes, 1877, Criminal Procedure 875); Code of 1939, Vol. II, § 34.1901. TENNESSEE: Code of 1857-

1858, §§ 5205, 5206; Code of 1938, §§ 11733, 11734. UTAH: Laws of Territory of Utah, 1878, Criminal Procedure, § 181; Rev. Stat. 1933, § 105-22-12. WASHINGTON: Statutes of Territory of Washington, 1854, Criminal Practice Act, § 89; Remington's Revised Statutes, 1932, Vol. IV, §§ 2095, 2305. WYOMING: Laws of Wyoming Territory, 1869, Criminal Procedure, § 98; Rev. Stat. 1931, § 3-501.

*By judicial decision or established practice judicially approved.* CONNECTICUT: For an account of early practice in Connecticut, see Zephaniah Swift "A System of the Laws of the State of Connecticut", Vol. II, 392: "The chief justice then, before the prisoner is called upon to plead, asks the prisoner if he desires counsel, which if requested, is always granted, as a matter of course. On his naming counsel, the court will appoint or assign them. If from any cause, the prisoner decline to request or name counsel, and a trial is had, especially in the case of minors, the court will assign proper counsel. When counsel are assigned, the court will inquire of them, whether they have advised with the prisoner, so that he is ready to plead, and if not, will allow them proper time for that purpose. But it is usually the case that the prisoner has previously employed and consulted counsel, and of course is prepared to plead." See Powell v. Alabama, 287 U. S. 45, footnote, 63-64. See also, Connecticut General Statutes, Revision of 1930, §§ 2267, 6476. FLORIDA: Cutts v. State, 54 Fla. 21, 23 (1907). See Compiled General Laws, 1927, § 8375 (capital crimes). INDIANA: Webb v. Baird, 6 Ind. 13, 18 (1854). See also Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 497-498 (1940); State v. Hilgemann, 34 N. E. 2d 129, 131 (1941). MICHIGAN: People v. Crandell, 270 Mich. 124, 127 (1935). PENNSYLVANIA: Commonwealth v. Richards, 111 Pa. Super. 124 (1933). See Com. ex rel. McGlinn v. Smith, 344 Pa. 41, 49, 59. VIRGINIA: Watkins v. Commonwealth, 174 Va. 518, 521-525 (1940). WEST VIRGINIA: State v. Kellison, 56 W. Va. 690, 692-693 (1904). WISCONSIN: Carpenter v. Dane County, 9 Wis. 274 (1859). See Stat. 1941, § 357.26.

C. *By constitutional provision.* GEORGIA: Constitution of 1865, Art. 1, Par. 8. See Martin v. Georgia, 51 Ga. 567, 568 (1874). KENTUCKY: Kentucky Constitution, § 11. See Fugate v. Commonwealth, 254 Ky. 663, 665 (1934).

II. States which are without constitutional provision, statutes, or judicial decisions clearly establishing this requirement:

COLORADO: General Laws, 1877, §§ 913-916; Colorado Stat. Ann. 1935, Vol. 2, c. 48, §§ 502, 505, as amended

by Laws of 1937, 498, § 1. See Abshier *v.* People, 87 Col. 507, 517. DELAWARE: See 6 Laws of Delaware 741; 7 *id.* 410; Rev. Code, 1935, §§ 4306, 4310. MAINE: See Rev. Stat. 1857, 713; Rev. Stat. 1930, c. 146, § 14. MASSACHUSETTS: See McDonald v. Commonwealth, 173 Mass. 322, 327 (1899). NEW MEXICO. NORTH CAROLINA. RHODE ISLAND: See State *v.* Hudson, 55 R. I. 141 (1935); General Laws, 1938, c. 625, § 62. SOUTH CAROLINA: See State *v.* Jones, 172 S. C. 129, 130 (1934); Code, 1932, Vol. I, § 980. VERMONT.

III. States in which dicta of judicial opinions are in harmony with the decision by the court below in this case:

ALABAMA: Gilchrist *v.* State, 234 Ala. 73, 74. MISSISSIPPI: Reed *v.* State, 143 Miss. 686, 689.

IV. States in which the requirement of counsel for indigent defendants in non-capital cases has been affirmatively rejected:

MARYLAND: See, however, Coates *v.* State (Court of Appeals of Maryland, decided April 22, 1942). TEXAS: Gilley *v.* State, 114 Tex. Cr. 548. But *cf.* Brady *v.* State, 122 Tex. Cr. 275, 278.